



**Shijenje v Stephen Gikera & Punit Vadgama t/a Gikera & Vadgama Advocates  
(Cause E003 of 2020) [2023] KEELRC 351 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 351 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E003 OF 2020  
AK NZEI, J  
FEBRUARY 9, 2023**

**BETWEEN**

**JOHNSON SHIJENJE ..... CLAIMANT**

**AND**

**STEPHEN GIKERA & PUNIT VADGAMA T/A GIKERA & VADGAMA  
ADVOCATES ..... RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondents herein vide a memorandum of claim dated October 1, 2020 and pleaded:-
  - a. That vide a letter dated October 10, 2016, the Claimant was employed by the Respondent as an Associate Advocate in Mombasa.
  - b. That on September 8, 2017, while busy at work in the office, the claimant was asked by the secretary to proceed to the boardroom for an urgent phone call from the Human Resource Personnel (Ms. Yvonne Ndinda) from the Respondent's Head office in Nairobi.
  - c. That the Claimant proceeded to the boardroom as directed, whereupon the said Yvonne Ndinda was put on call. That the said Yvonne Ndinda told the Claimant that the Respondent had decided to terminate the Claimant's services due to financial constraints they were experiencing, and that the Claimant should proceed to the Secretary's office and collect a letter to that effect.
  - d. That the Claimant's services were terminated effective October 4, 2017, on allegation that the Claimant had not made "substantial fees" over the months for the firm, which was a totally different reason from that communicated earlier by the Human Resource Personnel.



- e. That the allegation by the Respondents was an afterthought, and was not one of the requirements in the letter of offer (employment).
  - f. That contrary to the Respondent's allegations, the Claimant carried out all reasonable and lawful duties and functions of his position as required of him, with no complaints, warnings and/or performance issues, leading to his confirmation and rising as the second in rank to the Respondent's Head of Litigation.
  - g. That the Respondents violated cardinal Rules of natural justice by failing to accord the Claimant a fair hearing before termination of services, and that the termination was pre-determined, and malicious, and was understood to purport that the Claimant was a non-performer.
  - h. That the Claimant's salary, according to clause 7 of his employment letter, was Kshs 279,675.
  - i. That the Claimant was not issued with a proper notice in accordance with the law and Clause 6 of his letter of employment, and was not paid in lieu of notice.
  - j. That the Respondents never provided the Claimant with accommodation during the entire period of employment in Mombasa, and was not paid in lieu of the same.
  - k. That the Claimant was not allowed to utilize his 15 leave days, and was not paid in lieu of the same.
  - l. That the Claimant's termination was unlawful and unfair, and that the Respondent has refused to issue the Claimant with a Certificate of Service.
2. The Claimant set out the following claim against the Respondents:-
    - a. a declaration that the Claimant's termination was both unfair and unlawful.
    - b. an order that the Respondents do issue an acceptable certificate of service to the Claimant.
    - c. Kshs 279,675 being one month salary in lieu of notice.
    - d. Kshs 199,768 being unpaid leave for 15 days (Kshs 279,675/21x15).
    - e. Kshs 503,415 being unpaid house allowance in lieu of accommodation from November 2016 to October 2017 (279,675x15%x12 months)
    - f. Kshs 3,356,100 being compensation for unfair and unlawful termination (279,675x12 months).
    - g. Costs of the suit and interest.
  3. The Respondents entered appearance on March 26, 2021 and filed a statement of response on April 12, 2021. The Respondents denied the Claimant's claim and pleaded:-
    - a. that the Claimant was specifically employed as a Litigation Advocate vide the letter of offer dated October 10, 2016 under the terms and conditions therein.
    - b. that the Claimant was informed of the decision to terminate his employment by then Human Resource Manager, Ms. Yvone Ndinda, on September 4, 2017, and that the reason for termination was duly explained to the Claimant, both verbally and by Notice of termination dated September 4, 2017, which stipulated that termination was effective October 4, 2017.



- c. that the Claimant had received several warnings and concerns in regard to the manner he conducted his duties, how he handled the Respondent's clients and his general attitude in the performance of his work, which reasons were contained in the letter dated September 4, 2017.
  - d. that the Claimant failed to conduct himself in a manner that befit his position and failed to perform his duties satisfactorily towards both the Respondent and the Respondent's clients, and failed to heed to the many warnings made both orally and in writing.
  - e. that the Respondents issued the Claimant with a one month notice as stipulated under Section 35(1) (c) and Section 43 of the Employment Act and Clause 9 of the Respondent's Human Resource Manual and Policy.
  - f. that upon receiving the notice of termination, the Claimant was to work until 4<sup>th</sup> October 2017, but was absent on several days during the notice period. That the Claimant's dues were computed and paid into his account on October 11, 2017.
  - g. that the Claimant was being paid a consolidated sum of Kshs 279,675, which was inclusive of housing accommodation.
  - h. that at the time of termination, the Claimant was entitled to 15 days leave, and that he had expended 13.75 day of his leave entitlement and was paid for the 3.75 outstanding days as part of his final dues.
  - i. that the certificate of service was availed for Claimant's collection but he declined to do so.
4. When trial opened on January 18, 2022, the Claimant adopted his filed witness statement dated October 1, 2020 as his testimony. He also produced in evidence the eleven documents listed on his filed list of documents, save for the document listed as item no. 7 (computation of leave days). The Claimant further produced in evidence some two documents listed on his further list of documents dated November 5, 2021. Documents produced in evidence by the Claimant included the employment letter dated October 10, 2016 and the termination letter dated September 4, 2017, among others.
5. The witness statement that the Claimant adopted as his testimony basically replicates the averments made in the memorandum of claim dated October 1, 2020; which is reproduced at paragraph 1 of this Judgment. The Claimant further testified that the termination letter dated September 4, 2017 was given to him on September 8, 2017 and that it stated that his services would be terminated effective October 4, 2017. That allegations made in the termination letter were that the Claimant had not made substantial fees for the firm and was a non-performer.
6. It was the Claimant's evidence that he was not subjected to any performance appraisal before termination, that appraisal exercise was scheduled for November 2017 and that the allegations of the Claimant being a non-performer were unfounded. The Claimant further testified:-
- a. that he was not served with a 30 days notice, was not paid in lieu of notice; and had 15 outstanding leave days for which he was not paid.
  - b. that the Respondent did not house the Claimant, did not pay house allowance, and that the Claimant's salary was not consolidated.
  - c. that the Claimant was not issued with a certificate of service.
  - d. that the Claimant did not abscond duty as alleged by the Respondent, and that had he done so, that would have been one of the grounds of termination.



7. Cross-examined, the Claimant testified that his employment letter was dated October 10, 2016, and that the letter stated that his employment would commence on November 7, 2016; and was terminable by either party giving thirty days notice. The Claimant further testified:-
- a. that he worked throughout the notice period, and did not absent himself from work during the entire period.
  - b. that the Claimant was paid his September 2017 salary and welfare refund; and that there was no itemised payslip.
  - c. that the Claimant was not called for any disciplinary hearing on the allegations made against him.
  - d. that although the termination letter is dated September 4, 2017, the same was not given to the Claimant until September 8, 2017, and that from September 8, 2017 to October 4, 2017 is not 30 days.
  - e. that the Claimant did not absent himself from work between September 8, 2017 and September 18, 2017, and that he did not receive any email asking him to explain his whereabouts.
  - f. that the maker of the documents produced by the Claimant as exhibit nos. 7,8 and 9 was the Respondent's HR, Yvone Ndinda, and that according to her computation of leave days, the Claimant had 15 leave days as at May 24, 2017; and that he Respondents did not pay full dues.
8. The Respondent called one witness, Valarie Atieno Ogutu (RW-1), the Respondents' Human Resource Manager. The witness adopted her witness statement dated September 20, 2021 as her testimony. She also produced in evidence the Respondents' ten documents listed on the list of documents dated March 10, 2022. The witness further testified:-
- a. that the Claimant was employed on November 7, 2016 vide a letter dated October 10, 2016, and was to receive a gross salary of Kshs 279,675
  - b. that the Claimant had additional benefits including a medical cover, paid practising licence and legal training.
  - c. that the Claimant's duties are spelt out at paragraph 11 of his contract, and that he was expected to meet clients and advise them on legal matters, to raise fees and to follow up with the clients to settle them, to process legal documents on behalf of clients, to attend Court and to update clients after attending Court on their behalf.
  - d. that according to records, the Claimant's performance was not good.
  - e. that there was an instance when the Claimant absented himself from work without permission and the Respondent's Human Resource Manager wrote an email to him on 14/8/2017 at 11.07 (exhibit 5) asking for his whereabouts because he had not reported to work and his cellphone could not be reached. That there was another instance when the Claimant failed to advise a client satisfactorily, necessitating the intervention of a supervisor.
  - f. that on 12/4/2017, at 5.30 pm, a client wrote an email to the Claimant giving instructions to him, but the Claimant did not acknowledge the same until eight days later on 20/4/2017 at 3.19pm. That the Claimant did not act on those instructions, necessitating a supervisor's intervention vide an email send to the Claimant on 2/5/2017 at 8.57 am. The witness (RW1) took the Court through several other similar instances.



9. RW-1 further testified that the Claimant's termination letter, dated September 4, 2017 and taking effect on October 4, 2017, informed the Claimant that he had not made substantial fees for the firm and had shown indifference towards the course of the company for a prolonged period of time, and that there was no trace of improvement on his performance. That the letter served as a termination notice, with termination taking effect on October 4, 2017, and that the Claimant absented himself from work during the notice period.
10. It was the evidence of RW-1 that the Claimant had worked for ten months as at the time of termination, and was entitled to 15.75 leave days as an employee is entitled to 1.75 leave days per month. That the Claimant took 6 days leave and took another three days (pages 9 and 12 of the Respondent's bundle of documents) and absconded for one day on August 14, 2017, making a total of ten. That the Claimant was paid for 3.75 days, being his remaining leave days. That the Claimant was paid all his dues. The witness referred the Court to the Respondent's exhibit no. 8, which is a bankslip for Kshs 250,418. According to the witness, the amount included the Claimant's salary for September 2017, notice pay and 3.75 leave days payment. The witness did not tell the Court how this could be, taking into account that the Claimant's monthly salary was Kshs 279,674 (gross).
11. Cross-examined, RW-1 testified that the Claimant's salary was Kshs 275,675 per month, and that there was no indication that the salary was consolidated or that it included house allowance. That the Claimant was not being housed by the Respondent. The witness further told the Court that she had no evidence to show that the Claimant had applied for 15 days leave before his termination.
12. It was RW-1's further evidence that according to the Claimant's file, there was no performance appraisal conducted, and there was nothing on record to show that any disciplinary action was taken against the Claimant for absenteeism; that the Claimant was not issued with a notice to show cause, and that the Claimant was not given an opportunity to appeal the termination.
13. Upon considering the pleadings filed and evidence adduced by parties, issues that present for determination, in my view, are as follows:-
  - a. whether termination of the Claimant's employment was unfair.
  - b. whether the Claimant has a right to complain that he was unfairly terminated.
  - c. whether the Claimant is entitled to the reliefs sought.
14. The Claimant's termination letter dated September 4, 2017 is titled "termination of service with the company for non-performance" and states in part:-

"...we have reviewed your performance in terms of fees earned for the Firm since you joined the Firm in November 2016, and we have noted that you have not made substantial fees over the months for the Firm. You have shown utter indifference towards the cause of the company for a prolonged period of time. We have been constantly monitoring your actions and we found no trace of the slightest improvement in your performance. In the circumstances, we have decided to terminated your services with his company. As required by Law and as stated in your appointment letter, receive this as a one month's notice; your services are terminated effective from 4<sup>th</sup> October 2017. We take this opportunity to wish you all the best I your future endeavours..."



15. Section 41 of the *Employment Act* sets out a mandatory procedure that must be adhered to by an employer considering termination of an employee's employment on grounds of misconduct, poor performance or physical incapacity. The Section states as follows:-

“(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, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

16. From the evidence presented by the Claimant and the Respondent, the Respondent did not comply with the foregoing mandatory provisions before terminating the Claimant's employment. All that Respondent did was to give the Claimant an alleged one month termination notice. The Court of appeal held as follows in the case of *Kenfright [E.A] Limited -vs- Benson K. Nguti* [2016] eKLR:-

“apart from issuing a proper notice according to the contract (or payment in lieu of notice provided), an employer is duty bound to explain to an employee, in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken.... We come to the conclusion and find, in agreement with the trial Judge, that the termination of the Respondent's contract of service in the circumstances, was unfair, the payment in lieu of notice notwithstanding...”

17. Failure by an employer to comply with the mandatory procedure set out in Section 41 of the *employment Act* in terminating an employee's employment renders the termination unfair pursuant to Section 45 of the *Employment Act*, regardless of the allegations made by an employer against the employee. Such allegations can only be tested and their validity established during a hearing and/or disciplinary hearing during which the employee gets to be heard on the allegations before a decision to terminate his employment is reached.

18. Section 45(2) 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.



19. In my view, Section 45(1) and (2) (a) are to be read together with Section 41, and matters stated in section 45(2) are to be established during the hearing contemplated in Section 41(1) and (2). Those matters must be proved and/or established before termination, hence the necessity of a hearing before termination. Where a dispute arises after termination as to validity or truth of matters on the basis of which an employee's employment was terminated, the Court will be interrogating the fairness of termination or otherwise of the employee's employment vis-a vis the facts presented during the disciplinary hearing, and will make a decision on whether or not the validity of those facts was proved before termination.
20. In my view, an employer cannot terminate an employee's employment without according the employee an opportunity to be heard on the allegations made against him, and then seek to prove those allegations after effecting the termination. The reasons for termination must be proved before termination. There cannot be proof without hearing the affected party, in this case the employee.
21. The Respondent alleged poor performance on the part of the Claimant. In the case of *Jane Wairimu Muchira -vs- Mugo Waweru & Associates* [2012] eKLR the Court, while adopting the Industrial Court's findings in *Kenya Science International Technical And Allied Works [KSRITAWU] -vs- Stanley Kinyanjui & Magnate Ventures Ltd* (Cause No. 273 of 2010), held that the proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable time. The Court (in the Kenya Science Case (supra) held that two to three months is a reasonable period for an employee to improve.
22. The Court (in *Jane Wairimu* case – supra) stated the necessity of a performance appraisal on the employee, a process in which the employee must actively participate. In the instant case, both parties testified that an appraisal exercise on the Respondents' employees was scheduled for November 2017. The Claimant was, however, terminated on October 4, 2017, before the said exercise.
23. In view of all the foregoing, it is my finding that termination of the Claimant's employment by the Respondent was unfair; and I so declare.
24. On the second issue, it was a common ground that the Claimant was employed by the Respondent on November 7, 2016 and that his employment was terminated on October 4, 2017. The Claimant was in the Respondent's employment for ten months. Section 45(3) of the *Employment Act* provides:-

“an employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.”
25. The legal import of the foregoing statutory provision, in my view, is that for an employee to claim compensation for unfair termination of employment, he must have worked continuously for his employer for a period not less than thirteen months immediately before the date of termination. The Claimant had worked for the Respondents for ten months immediately before 4<sup>th</sup> October 2017 when his employment was terminated. He is barred by the foregoing statute from claiming compensation for unfair termination. On the fourth issue, the claim for compensation for unfair termination of employment is declined.



26. On the claim for one month salary in lieu of notice, Section 35(1) of the *Employment Act* provides:-
- “where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.”
27. It was a common ground that the Claimant’s termination letter dated 4/10/2017, which also served as a one month termination notice, was given to the Claimant by the Respondent on September 8, 2017. The twenty-eight days notice period is to be reckoned from the day “next following the giving of notice in writing”, which was September 9, 2017. There were twenty seven days from September 9, 2017 to October 4, 2017. The Respondent did not give a proper termination notice to the Claimant. The claim for Kshs 279,675 being one month salary in lieu of notice is allowed.
28. On the claim for unpaid leave days, it was a common ground that as at May 2017, the Claimant had 15 unutilised leave days. The Respondent did not demonstrate that the Claimant took any leave between May 2017 and October 4, 2017; this despite the fact that under Section 74(f) of the *Employment Act*, the employer is obligated to keep records of his employees’ annual leave entitlements, days taken and days due. The claim for Kshs 199,768 being unpaid leave days is allowed.
29. On the claim for unpaid house allowance, Clause 7 of the Claimant’s employment contract dated October 10, 2016 states as follows:-
- “7) your gross salary shall be Kshs 279,675 per month subject to statutory deductions payable monthly in arrears on the last working day of each month which will be deposited into your bank account of choice.
- a. a break down of your salary and deductions shall be stated in your payslip available for your collection from the accounts department on your demand.
- b. Any increase in salary and bonuses are open to negotiation between the parties.”
30. The Claimant’s contract of employment did not contain a provision consolidating the Claimant’s salary or indicating that the same contained an element intended to enable the Claimant to provide himself with housing accommodation. He pleaded and testified that the Respondent did not provide him with housing accommodation. Under Section 31(1) and (2) (a), the Claimant was entitled to be provided with housing accommodation by the Respondent, or to be paid such sufficient sum as rent/ house allowance in addition to his monthly salary.
31. None of the parties produced copies of the Claimant’s payslip/itemised written pay statement issued by the Respondent pursuant to Section 20 of the *Employment Act*, showing that the Claimant’s gross salary included house allowance. The claim for Kshs 503,415 being unpaid house allowance is hereby allowed. The claim for issuance of a Certificate of Service is allowed.
32. In sum and having considered submissions filed by Counsel for both parties, judgement is hereby entered for the Claimant against the Respondents jointly and severally for:-
- a. One month salary in lieu of notice .....Kshs 279,675
- b. Unpaid leave days.....Kshs 199,768
- c. Unpaid House allowance.....Kshs 503,315



Total Kshs 982,858

33. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the [Employment Act](#).
34. The Respondent shall forthwith issue a Certificate of Service to the Claimant pursuant to Section 51 of the [Employment Act](#).
35. The Claimant is awarded costs of the suit and interest at Court rates.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> FEBRUARY 2023**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

**Appearance:**

.....for Claimant

..... for Respondent

