



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muyegu v Bhatia (Employment and Labour Relations Cause  
507 of 2016) [2023] KEELRC 242 (KLR) (6 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 242 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 507 OF 2016**

**K OCHARO, J**

**FEBRUARY 6, 2023**

**BETWEEN**

**SHEILA ANZEMO MUYEGU ..... CLAIMANT**

**AND**

**ATUL BHATIA ..... RESPONDENT**

**JUDGMENT**

1. This suit was initiated through a memorandum of claim dated March 30, 2016, by the Claimant against the Respondent. Alleging that the termination of her employment by the Respondent, was unlawful, and wrongful, the Claimant sought against the Respondent the following reliefs and orders:
  - a. A Sum of Kshs 425,320 as particularized in paragraph 5 of the claim inclusive of compensation for wrongful dismissal to a maximum of 12 months wagesSalary in Lieu of notice Kshs 15,500House Allowance 15% x 15000x56 Kshs 125,000Leave days 15000/30x21x14/3 Kshs 49,000Compensation for unfair termination  
15000x12 months Kshs 180,000  
One Month's Salary arrears Kshs 15,000NSSF Payments Kshs 17,920NHIF Payments Kshs 22,400  
Total Kshs 425,320
  - b. Costs of the suit
  - c. Interest in (i) and (ii) above
  - d. Any other relief as the court may deem fit.
2. The Respondent entered appearance on the April 8, 2016 and subsequently filed a reply to the Memorandum of claim and Counterclaim dated June 8, 2016. Pursuant to the procedure Rules, the Claimant filed a reply to the Respondent's response and counterclaim, on March 31, 2017. At the close



of pleadings, the matter got destined for hearing on merit. The matter proceeded for hearing on the October 25, 2022, in absence of the Respondent who was not in attendance in court.

3. She urged the Court to adopt her witness statement as her evidence in chief and admit the documents she filed herein as documentary evidence. The statement was so adopted and the documents admitted, respectively.

#### **The Claimant's Case.**

4. The Claimant stated that she was employed by the Respondent as a Domestic Help on the May 25, 2011 with a salary of Kshs 15,000. Her employment was one that was without any written contract of employment, it was an oral contract of employment. She asserted that she served the Respondent with Loyalty and diligence until January 24, 2015 when the Respondent terminated her services and failed to pay her terminal dues.
5. The Claimant avers that the termination of her employment was without procedural fairness in contravention of Section 41 of the *Employment Act*. The Respondent didn't give her any reasons for, and an opportunity to explain herself on the reason before, the termination.
6. The claimant further avers that the manner her employment was terminated amounted to a summary dismissal, and holds that the same in contravention with the provisions of Section 44(3) of the *Employment Act*.

#### **Respondent's Case.**

7. As indicated hereinabove, the Respondent did file a response to the Claimant's statement of Claim, and a Counterclaim for Kshs 70,000. In the response, while admitting that the Claimant was his employee, he denied the Claimant's allegations on the termination of her employment and entitlement to the reliefs sought. In the Counterclaim, he alleged that while the Claimant was working for him, he advanced her a loan of Kshs 80,000 and that at the time of the separation, she had only repaid Kshs 10,000 leaving a balance of Kshs 70,000.
8. The Respondent pleaded that the Claimant was not dismissed from employment, but she asserted duty, and his efforts to get her didn't bear any fruits as she totally failed to respond to his messages or pick his calls. The desertion occurred on the January 21, 2016.

#### **The Claimant's Submissions.**

9. The Claimant distilled two issues for determination thus;
  - i. Whether the claimant's employment contract was unlawfully and unfairly terminated?
  - ii. Whether the claimant is entitled to compensation and damages sought in the memorandum of claim?
10. On the first issue counsel submitted that the claimant had been hardworking for the period she was employed but was unjustly dismissed without due regard to the process of law.
11. The claimant submitted that there was no compliance with section 41 of the *Employment Act*, 2007 as she was not issued with a notice or granted hearing before termination.
12. The claimant submits that the claimant failed to comply with all the substantive and procedural tests of termination as required by section 43 and 41 of the *Employment Act*.



13. The claimant relies in the holding in the case of *Anthony Mkala Chitavi v Malindi Water & sewerage co Ltd Industrial Court No 66 of 2012*.

14. The Claimant further relied in the holding in *Mary Chemwono Kiptui v Kenya Pipeline Company Limited (2014) eKLR*, where the Court observed:

' Section 41 of the *Employment Act* couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice.

The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tents'

15. On the 2<sup>nd</sup> issue the claimant submits that having been unfairly terminated she is entitled to compensation and damages sought.

#### **Respondent's Submissions.**

16. The Respondents did not file submissions.

#### **Analysis and Determination.**

17. Having read the pleadings, evidence on record and submissions by counsel, the issues for determination are;

- i. What is the import of the Respondent's failure to adduce evidence in support of his pleadings?
- ii. Whether termination of the Claimant's employment by the Respondent was unfair?
- iii. Whether the Claimant is entitled to the prayers sought?

What is the import of the Respondent's failure to adduce evidence in support of his pleadings?

18. This Court has before in its judicial decisions pronounced that where a party files pleading but nonetheless for one reason or the other fails to tender evidence in support of the pleadings and more specifically on the factual contents of the same, such pleadings will remain mere statements, and the court will consider them just as such. No probative value shall be found in the pleadings. This Court shall treat the Respondent's response and counterclaim as mere statements.

19. Minus evidence, the Respondent's Counterclaim remained unproved. It is hereby dismissed.

#### **Whether the termination of the Claimant's employment was unfair.**

20. I note that there was no written contract of employment entered between the Claimant and the Respondent therefore there are no terms of reference in this case. However, through their pleadings, the parties agree that the claimant was employed by the respondent as a Domestic help earning a salary of Kshs 15000. I therefore find that there existed an employer employee relationship notwithstanding lack of an employment contract.

21. In addressing presence of fairness or otherwise in termination of an employee's employment or summary dismissal of an employee, a court must consider two aspects, the substantive justification and the procedural fairness. The two form the total unit of fairness in the termination or summary



dismissal. Absence of both these components or any of them shall render the termination or summary dismissal unfair.

22. The two components are statutory. Section 43 of the [Employment Act](#) dictates that in a dispute involving termination of an employee's employment, the employer bears the burden to prove the reason[s] for the termination. In absence of the proof, the termination shall be deemed unfair. Section 45 of the Act places a further burden on the employer to prove that the reason[s] was valid and fair. Without hesitation I conclude that in this matter, the Respondent didn't discharge the twin legal burden. He didn't adduce any evidence to establish the reason [s for the termination and validity and fairness of the same.
23. The law has laid down a framework for termination of employment in Section 45(2) of the [Employment Act](#) provides that;
- 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.
24. In the case of [Walter Ogal Anuro v Teachers Service Commission \(2013\)](#) The court elaborates on the tests for fair termination:
- ' For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.'
25. The Claimant asserted that the termination of her employment lacked procedural fairness as she was not given any reasons that could culminate to the termination, and accorded any opportunity to make a representation on the reason[s]. In absence of evidence from the Respondent, I find her evidence on this unchallenged and come to an inevitable conclusion that the termination of her employment was procedurally unfair, as the mandatory procedure set in section 41 of the [Employment Act](#) was violated.

#### **Whether the Claimant is entitled to the reliefs sought.**

26. Having found as I have hereinabove, that the termination of the Claimant's employment was procedurally and substantively unfair, I now turn to consider the reliefs sought. No doubt there was an employer employee relationship, between the combatants herein. The Claimant's salary of Kshs 15000, was paid at the end of the month. By dint of the provisions of section 35 of the [Employment Act](#), it was one terminable by a twenty-eight days' notice or salary in lieu thereof. In the circumstances of this matter, the Claimant is entitled to one month's salary in lieu of notice, Kshs 15,000.
27. The Claimant further sought for compensatory relief pursuant to section 49[1][c] of the [Employment Act](#). She seeks for the maximum amount awardable under the provision, twelve months' gross salary. The power donated under this provision is discretionary. A grant of the relief and the extent thereof depends on the circumstances of each case. I have considered the circumstances of the termination of the Claimant's employment, the length of time she was with the Respondent, and the fact that it has not been demonstrated that she contributed in any manner to the termination, and find that she is entitled to the relief and to an extent of 6 [six] months' salary, Kshs 90,000.



28. The Claimant asserted that throughout her employment with the Respondent, was not allowed to proceed for her annual leave. Annual leave for an employee is a statutory right under the *Employment Act*, 2007, where it is not taken, because the employer didn't grant it, the employee is entitled to compensation in lieu thereof. The Claimant's evidence that the Respondent didn't allow her to take the leave is unchallenged, I consequently award her Kshs 49,000 compensation for untaken leave.
29. The Claimant sought for unpaid House allowance, for the sum of Kshs 125, 000. I find the Claimant's pleadings and evidence, on this claim to sketchy to enable this Court to grant the relief. Neither in her pleadings nor evidence, does she state that the Kshs 15000 was exclusive of house allowance. She further, does not assert that she was not accommodated by the Respondent in anywhere, either within his premises or elsewhere. The Court is prompted to state this considering the nature of the service she was rendering, a house help. Consequently, I decline to grant the sums sought under this head or any sum at all.
30. In the I enter judgment for the Claimant in the following terms;
- I. One month's salary in lieu of notice, Kshs 15000.
  - II. Compensation pursuant to the provisions of section 49[1][c] of the *Employment Act*, 6[six], months' gross salary, Kshs 90,000.
  - III. Compensation for untaken leave, Kshs 49,000.
  - IV. Interest on the sums awarded hereinabove, at court rates from the date of filing this suit till full payment.
  - V. Costs of the suit.

**READ, SIGNED AND DELIVERED THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**Ocharo Kebira**

**Judge**

**In presence of**

**Mr. Kihunyu 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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

