



Ooga v Thomas Barnado House (Employment and Labour Relations Cause 693 of 2017) [2023] KEELRC 706 (KLR) (20 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 706 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 693 OF 2017**

**JK GAKERI, J
MARCH 20, 2023**

BETWEEN

THOMAS OOGA CLAIMANT

AND

THOMAS BARNADO HOUSE RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a Memorandum of Claim filed on April 11, 2017 alleging wrongful dismissal by the Respondent.
2. It is the Claimant's case that he was employed by the Respondent as a Welfare Officer on January 1, 2015 at a monthly salary of Kshs 120,000/= which had risen to Kshs 132,400/= by the date of dismissal and worked diligently.
3. The claimant avers that his employment was terminated on February 21, 2017 unlawfully and without notice and about a week later he was given an unsigned termination letter dated February 21, 2017 allegedly for gross misconduct which he denies.
4. That the Respondent did not give the Claimant details of the alleged dishonesty or misconduct in October 2016.
5. That his contract was renewed in January 2017.
6. The Claimant further avers that he was not given a hearing and was not paid for the month of February 2017 and had 32 leave days pending.
7. Finally, the Claimant avers that he was an employee of the Respondent for about 2 years.



8. The Claimant prays for:
- i. A declaration that termination of employment by the Respondent was wrongful, malicious and unfair.
 - ii. Salary for February 2017 Kshs 132,400/=.
 - iii. One month's salary in lieu of notice Kshs 132, 400/=.
 - iv. Accrued leave days Kshs 141,226/=.
 - v. 12 months' salary Kshs 1,588,800/=.
 - vi. Costs of the claim.
 - vii. Interest on the above
 - viii. Any other or further relief as the court may deem fit and just.

Respondent's case

9. In its Memorandum of Response filed on June 20, 2017, the Respondent admitted that the Claimant was its employee but denied having terminated his employment unlawfully or unfairly.
10. The Respondent avers that the Claimant was on several occasions caught having sexual intercourse with employees of the Respondent in dormitories where minors slept contrary to the Respondent's Code of Conduct and was suspended for 2 weeks for investigations and was notified of the misconduct and was invited for a disciplinary hearing and his employment was terminated thereafter.
11. That during the hearing, the lady the Claimant was accused of having sex with testified and confirmed the allegation but alleged coercion by the Claimant as his senior.
12. The Respondent avers that it was unclear as to how the Claimant obtained a draft termination letter dated February 2, 2017 before the due date as he did not report back to the office after he was notified of the termination on February 21, 2017.
13. The Respondent further avers could not trace the Claimant's law firm for service.
14. That attempts by the Respondent to have the Claimant collect his terminal dues amounting to Kshs 161,619.00 being his salary for the month of February 2017 and leave days had fallen through and he was not entitled to salary in lieu of notice.

Evidence

15. When the matter came up for hearing on September 19, 2022, counsel for the Claimant was not ready to proceed and Respondent's counsel was a no show as was the case on June 6, 2022 before the Deputy Registrar.
16. Counsel requested that the matter proceeds by way of affidavit and written submissions and the court granted the request and parties were accorded 14 days a piece to file and serve submissions and a mention was slated for October 19, 2022 to confirm compliance and none of the parties was present and the same was repeated on January 31, 2023 when the court issued a judgment date.
17. By February 20, 2023 when the court retired to prepare this judgement, none of the parties had filed submissions or affidavit.



18. Rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2016 empowers the court to determine a matter before it by way of documentary evidence. The rule provides:

'The court may, either by an agreement by all parties or on its own motion proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties.'
19. Documentary evidence on record reveal that the Claimant was employed by the Respondent as a Welfare Officer on 1 January 4, 2015 under a one-year fixed term contract effective January 1, 2015 to December 31, 2015 at a consolidated monthly salary of Kshs 115,000/= subject to statutory deductions with 21 days of annual leave and a leave allowance of Kshs 3,800/=.
20. The Respondent's Code of Conduct which the Claimant signed on January 10, 2015 required staff members to uphold 'high moral standards and not put themselves in positions in which personal ethics and individual motives may be questioned.'
21. Evidence show that the Claimant received a salary adjustment of Kshs 5,000/= effective February, 2015.
22. At the Claimant's instigation, the contract was renewed for a further one (1) year from January 1, 2016 to December 31, 2016 at Kshs 120,000/= per month and a further renewal from January 1, 2017 to December 31, 2017 at Kshs 132,400/=.
23. Puzzlingly, neither of the two termination letters on record dated February 21, 2017 are signed by the Respondent.
24. Although, the shorter version of the letter was allegedly received by the Claimant, it has no authentication by the employer.
25. It would appear that the drafts were given to the Claimant by an insider.
26. According to the Respondent, no termination letter was issued to the Claimant and it remained at its office. A copy availed by the Respondent is similar to the version provided by the Claimant though unsigned.
27. Neither the Claimant nor the Respondent adduced evidence as to whom, where and when the draft termination letters were served upon the Claimant. The second letter which is not signed by either of the parties directed the Claimant to collect his final dues on March 3, 2017 and had to clear and prepare a written hand over report before payment. That does not appear to have happened as a cheque drawn in the Claimant's favour dated March 2, 2017 for the sum of Kshs 161,619.00 was not collected.
28. It is discernible that the Claimant did not return to the Respondent's premises after February 21, 2017.
29. Noteworthy, it was the Claimant's duty to supervise Nursery staff through the Nursery Supervisor and House Mothers through the Lead Mother and worked with the Assistant Welfare Officer, Clinical Officer, Nutritionist, Physiotherapist, Occupational Therapist and others.
30. Specifically, it was his duty, in conjunction with his Assistant to deal with medical related issues including the Clinic, emergencies, medicines, equipment, check-ups. He was also in charge of the Nursery, Abandoned babies unit, Family units, General duties, Staff appraisals, budget, recruitment and training and others.



Determination

31. The issues for determination are:
- i. Whether termination of the Claimant's employment was unfair
 - ii. Whether the Claimant is entitled to the reliefs sought.
32. As regards termination of employment, while the Claimant alleges that the termination was wrongful and unfair, the Respondent averred that the Claimant was proven guilty of gross misconduct and the committee was unanimous on termination of employment and he refused to collect his duties.
33. Both the provisions of the *Employment Act*, 2007 and court decisions are unambiguous that for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair, as aptly captured by the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Limited (2017) eKLR* and Ndolo J in *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR* as follows;
- ' 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. Substantive justification had to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.'
34. As regards substantive justification, it is the obligation of the employer to establish that it had a reason(s) for the termination, the reason(s) was valid and fair and the grounds were justified. (See *Pius Machafu Isinndu V Lavington Security Guards Limited (2017) eKLR*).
35. I will now proceed to apply the foregoing principles and propositions of law to the facts of the instant case.
36. A copy of the termination letter filed by the Respondent dated February 21, 2017 states the reasons for termination as
- ' Having intimate relationship with sexual inclination with a fellow employee within the Children's Home Premises'
37. Although the Claimant alleged that he was unaware of the gross misconduct, it is decipherable that he was aware of the particulars and the institution may have been hesitant of being explicit as the allegations were too personal to the Claimant. Although there is no evidence that the Claimant was invited to a disciplinary hearing, he attended one on February 21, 2017 and Pauline Mwendu and Tabitha Mbuya both House Mothers in his Department testified about his escapades. Tabitha's evidence was explicit and revealing and more cogent than Pauline's.
38. It is unclear why the Claimant did not adduce evidence at the hearing other than a mere denial. He did not cross-examine the witness or raise any issue. Evidence of what had transpired would have ameliorated the Claimant's position nominally in the face of overwhelming evidence of sexual impropriety with junior staff at the work place contrary to the Respondent's Code of Conduct, 2014 which the Claimant was privy to.



39. Paragraph (v) of the Clause VII on Staff General Conduct provided that;
- 'No intimate relationships with sexual inclinations shall be entertained between staff members or staff and children. This relates to all projects under the KCH Charity. Such relationships reflect negatively on the good name of the Home and hence having damaging effect to the institution.'
40. The Claimant violated this paragraph and was thus guilty of misconduct as the court so finds.
41. For the foregoing reasons, the court is satisfied that the Respondent had established that it had a valid and fair reason to terminate the Claimant's employment summarily. The Claimant's conduct cast him and the institution negatively and termination of the Claimant's employment was substantively justifiable.
42. As regard procedure, the provisions of Section 41 of the *Employment Act*, 2007 are clear on the specific precepts to be complied with including notice, hearing representations and determination as was held in *Postal Corporation of Kenya V Andrew K Tanui (2019) eKLR* and legions of other decisions.
43. From the documents on record, it is unclear as to whether the Claimant had been notified of the specific allegations he was facing by way of a notice to show cause as none was filed and whether he responded.
44. It is equally unclear as to whether the Claimant had been informed of his right to attend the disciplinary hearing with a witness of his choice. It is apparent that he attended the hearing alone and two witnesses gave evidence.
45. The minutes of the disciplinary hearing state that the meeting commenced at 3.00 pm but are silent on when the meeting ended and the Claimant was informed to await communication from the Respondent.
46. The minutes were signed by the Chief Administrator who attended the meeting and signed the termination letter.
47. From the foregoing, it is clear that the provisions of Section 41 of the *Employment Act* were not complied with as required by Law as the Claimant was not informed of the allegations against him prior to and in the presence of a witness of his choice and had not been informed of the right to be accompanied by a witness. It is the employer's duty to do so as held in *Postal Corporation of Kenya V Andrew K Tanui (supra)*.
48. Similarly, it is unclear as to whether the Claimant was accorded the opportunity to cross-examine the witnesses or opted to deny and stay mum.
49. For the above stated reasons, it is the finding of the court that the Respondent has failed to prove that termination of the Claimant's employment was procedurally fair as ordained by the provisions of Section 41 of the *Employment Act*, 2007.

Reliefs

- i. Having found that termination of the Claimant employment by the Respondent was unfair for want of procedural propriety, a declaration to that effect is hereby issued.
- ii. Salary in lieu of notice



50. Having found that the summary dismissal of the Claimant was justified, the Claimant is not entitled to pay in lieu of notice.
- iii. Salary for February 2017
51. Since the Claimant refused and or failed to collect his dues as directed by the Respondent, he is awarded the salary for the 21 days worked in February 2017.
- iv. Accrued leave days
52. The termination letter dated February 21, 2017 states that the Claimant had 32 accrued leave days for which he is entitled to payment and is awarded the same.
- v. 12 months compensation
53. Having found that termination of the Claimant's employment was unfair for want of procedural fairness, the Claimant is entitled to the relief provided by Section 49 (1) (c) of the Employment Act, 2007.
54. In determining the quantum of compensation, the court has considered that:
- i. The Claimant was an employee of the Respondent for about 2 years, a fairly short time.
 - ii. The Claimant had no documented record of previous misconduct or warning.
 - iii. The Claimant did not appeal the decision of the committee.
 - iv. The Claimant did not express his wish to continue in the Respondent's employment.
 - v. It is unclear why the Claimant refused to collect his dues.
55. In the circumstances, the court is satisfied that the equivalent of one (1) month's salary is fair Kshs 132,400/=.
56. In conclusion, Judgement is entered for the Claimant against the Respondent as follows;
- a. Declaration that termination of employment was unfair.
 - b. Salary for the days worked in February 2017.
 - c. 32 Accrued leave days.
 - d. Equivalent of one month compensation.
 - e. Costs of this suit
 - f. Interest at court rates from date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF MARCH 2023

DR. JACOB GAKERI



JUDGE

