



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mutonyi v Phoenix Aviation Limited (Cause 549 of 2016)  
[2023] KEELRC 707 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 707 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 549 OF 2016  
JK GAKERI, J  
MARCH 15, 2023**

**BETWEEN**

**PROTUS CHIMAIISI MUTONYI ..... CLAIMANT**

**AND**

**PHOENIX AVIATION LIMITED ..... RESPONDENT**

**JUDGMENT**

1. By a statement of claim filed on April 7, 2016, the claimant sued the respondents alleging wrongful and unfair termination of employment by the Respondent.
2. The claimant avers that he was employed by the 1<sup>st</sup> respondent's company (Bravo Park) Investments Limited as a Gardener in June 2004 and simultaneously the Claimant was engaged by the 1<sup>st</sup> respondent to work for the Wine Masters Limited.
3. That in March 2008, the 1<sup>st</sup> respondent engaged the Claimant as an Office Messenger- Flight Operations Department of the 2<sup>nd</sup> Respondent.
4. The claimant further avers that on April 30, 2013, the respondents falsely reported to the Police that the claimant had broken into the respondents office and stolen money and other valuables and was arrested and charged with theft but was acquitted by the Chief Magistrate's Court, Kibera under section 210 of the *Criminal Procedure Code*.
5. That his employment was terminated by word of mouth and no payments were made.
6. The Claimant prays for:-
  - i. Salary for April 2013 Kshs.16,000/=
  - ii. 3 months' salary in lieu of notice Kshs.48,000/=
  - iii. Overtime 2 hours per day Kshs.389,333/=



- iv. Service pay for 10 years Kshs.80,000/=
- v. Damages for unfair termination and hardship to be assessed by the court.
- vi. Costs of this suit.

### **Respondents case**

7. The Respondent filed a Memorandum of Reply and Counter-Claim on May 3, 2016 stating that the Claimant was employed by the Respondents company Wine Masters Limited in June 2004 and declared redundant on February 28, 2008 and paid all his dues by the 1<sup>st</sup> Respondent and was employed by the 2<sup>nd</sup> respondent on April 1, 2008 as an Office Messenger.
8. That on April 29, 2013, a Safe disappeared from the 1<sup>st</sup> Respondent's house when the Claimant was on duty and he was arrested and charged for stealing by servant, released on bond and subsequently acquitted and his employment was terminated.
9. That the Claimant had keys to the house in which the Safe was kept.
10. The Respondent denies that the Claimant was entitled to the reliefs claimed.
11. The Respondent further avers that the Claimant owed Phoenix Co-operative Savings and Credit Society Kshs.91,822/= which remain unpaid.
12. It is the Respondents case that the Claimant was guilty of gross misconduct.
13. The Respondent claims Kshs.850,050/= as counter-claim being the value of the lost items.
14. The Respondent prays for:-
  - i. Finding that the Claimant owes the 1<sup>st</sup> Respondent Kshs.850,000/=
  - ii. Dismissal of the Claimant's suit with costs.

### **Claimant's evidence**

15. In his written statement adopted in court, the Claimant stated that he had worked for the 1<sup>st</sup> Respondent for 8 years. He testified that he was not invited for a hearing before termination of his employment.
16. That he was unaware of any investigation by the police.
17. The Respondents did not adduce evidence. Counsel for the Respondent withdrew from acting for them on June 29, 2022 on the date the hearing date was set.
18. The court directed the Claimant's counsel to serve submissions.

### **Claimant's submissions**

19. The Claimant's counsel submitted on three issues, namely; whether the Claimant is entitled to general damages for wrongful termination of employment, whether the Claimant had proved a case for malicious prosecution and entitlement to terminal dues.
20. As regards general damages, counsel relied on section 45 (4) of the *Employment Act* to underscore what unfair termination of employment entailed. Counsel submitted that the defendants maliciously brought criminal charges against the Claimant without due process.



21. Reliance was also made on sections 43(1) and 45 of the *Employment Act* to emphasize the employer's duty to prove the reason(s) for termination of employment.
22. The decision in *Kenya Airports Authority v Silas Obengete* (2008) eKLR was relied upon to underscore the right to be heard where the court relied on the decision in *Southern Highlands Tobacco v McQueen* (1960) E.A 490.
23. As to whether the Claimant had proved malicious prosecution, reliance was made in the decision in *Barclays Bank of Kenya Limited v Julius Kiema Kenga and another* (2019) eKLR to urge that the court had jurisdiction to award general damages for malicious prosecution and defamation arising out of an employment relationship.
24. The decision in *Shiveka Alielo v Kenya Post Office Savings Bank & another* (2019) eKLR was also cited to reinforce the submission.
25. As regards entitlement to terminal dues, counsel submitted that the Claimant was entitled to the amount prayed for as there was clear discrimination and biasness in the administration of justice. The decision in *Southern Highlands Tobacco v McQueen* (Supra) was cited for the proposition that;
 

“A person wrongfully dismissed is entitled to be compensated fully for the financial loss he suffers as a result of his dismissal.”
26. By 7<sup>th</sup> February when the court retired to prepare this judgment, the Respondents had not filed submissions.

### **Determination**

27. The issues for determination are:-
  - i. Whether termination of the Claimant's employment by the Respondents was unfair.
  - ii. Whether the Claimant is entitled to the reliefs sought.
28. On the first issue, it is not in dispute that the Claimant was an employee of the Respondents on March 31, 2008 as an Office Messenger having been declared redundant by Wine Masters Limited on February 28, 2008 but retained on personal basis on the same terms and conditions.
29. The employment letter on record shows that the Claimant worked from Monday to Sunday from 8.00 am to 5.00 p.m with one day off in a week and would be compensated for any overtime or additional days worked and was entitled to 30 days annual leave and all Gazetted Public Holidays.
30. The contract was terminable by one month's notice by either party.
31. It is also not in contest that the Claimant was arrested on April 30, 2013 and charged on May 2, 2013 for the offence of stealing by servant.
32. Although the Claimant testified that he was acquitted, he did not provide a copy of the proceedings as evidence and the Respondent did not either.
33. It is unclear to the court whether there was an acquittal as on December 5, 2013 as alleged.
34. The Claimant testified that he was dismissed thereafter by word of mouth.
35. Section 45 (2) of the *Employment Act* provides that for a termination of employment to pass muster, it must be demonstrated that the employer had a valid and fair reason to terminate the employees



- employment based on his conduct, capacity or compatibility or operational requirements and the termination was conducted in accordance with fair procedure. The provisions of section 43, 47(5) and 41 of the Act respecting prove of reason(s), justification and procedure embellish the provisions of section 45 of the Act.
36. These and other provisions provide the infrastructure on termination of employment.
37. In *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, the court laid it bare that for a termination of employment to pass the fairness test, it must have been substantively justifiable in terms of the reason(s) relied upon and procedurally fair. The Court of Appeal expressed similar sentiments in *Naima Khamis v Oxford University Press (E.A) Limited* (2017) eKLR, a termination of employment may be substantively or procedural unfair or both substantively and procedurally unfair.
38. In this case, the Respondent tendered no evidence on why it terminated the Claimant's employment but documents on record reveal that the Claimant was indeed arrested and charged for stealing by servant the outcome of the suit notwithstanding.
39. It is not in dispute that the Criminal case precipitated termination of the Claimant's employment.
40. It requires no gainsaying that the burden of proof that an unfair termination has taken place is always on the employee even if circumstances in which the suit is undefended or the Respondent does not participate in the hearing. (See *Humphrey Munyithya Mutemi v Soluxe International Group of Hotels and Lodges Limited* [2020] eKLR.)
41. The sentiments of Abuodha J. in *Nicholus Kipkemoi Korir V Hatari Security Guards* (2016) eKLR are instructive. The learned Judge stated;
- “ This burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at trial. The Claimant must still prove his or her case . . . ”
42. As regards the reason(s) for termination, section 43(2) of the *Employment Act* provides that;
- The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
43. Based on the documents on record, and in particular in relation to the alleged theft of a safe from the 1<sup>st</sup> Respondent house/office, the court is persuaded that the 1<sup>st</sup> Respondent may have had a reasonable ground to suspect that the Claimant was involved or aware of the theft.
44. In the courts view, the 1<sup>st</sup> Respondent may appear to have had a valid reason to terminate the Claimant's employment.
45. Puzzlingly, from the evidence on record, it is unclear as to when the Claimant's employment was terminated. Neither the written statement nor the oral evidence adduced in court make reference to the date of termination.
46. What is not in contest is that the Claimant had a pending criminal case between May 2, 2013 and December 5, 2015.
47. As regards procedural fairness as ordained by the provisions of section 45 (2) (c) and 41 of the *Employment Act* and elaborated in legions of decision such as *Loice Atieno v Kenya Commercial Bank Limited* and *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR among others, there is no



evidence on record to suggest that the Respondent complied with statutory provisions on procedural propriety in the termination of the employment contract.

48. The Respondent furnished no evidence of a notice to show cause or minutes of a disciplinary hearing.
49. More significantly, the Claimant testified that he was not invited to a hearing by the Respondent and was unaware of any investigations.
50. In light of the foregoing, it is the finding of the court that termination of the Claimants employment by the Respondent was procedurally unfair.
51. Before delving into the reliefs sought by the Claimant, it is essential to dispose the issue of malicious prosecution and false imprisonment raised by the Claimant's counsel. It is not in dispute that the Claimant neither pleaded nor alleged that he was maliciously prosecuted and tendered no evidence to establish the attendant facts and did not pray for any relief on that score. The law is clear that he who alleges is duty bound to prove the allegations as ordained by section 107, 108 and 109 of the Evidence Act. The Claimant tendered no evidence to prove the elements of malicious presentation or false imprisonment and the issue remains unsubstantiated.

### **Reliefs**

52. Having found that termination of the Claimant's employment was unfair, the court proceeds as follows;

#### **Salary for April 2013 Kshs.16,000/=**

53. Puzzlingly, neither the Claimant's written statement dated April 6, 2016 nor the oral evidence adduced in court made reference to unpaid salary for April 2013.

In the absence of evidence, the prayer is declined.

#### **Three months' salary in lieu of notice Kshs.48,000/=**

54. It is unclear on what basis this claim is made. The Claimant did not avail evidence of a contract of service or Collective Bargaining Agreement prescribing three months' notice of termination or pay in lieu. However, since the Respondent did not accord the requisite notice, the Claimant is awarded one (1) month's salary in lieu of notice.

#### **Overtime 2 hours per day for ten (10) years Kshs.389,333.00**

55. Neither the Claimant's written statement nor the oral evidence adduced in court alluded to the reporting and exit times or overtime pay having accrued and when.
56. Similarly, a copy of the Claimant's contract of service dated March 31, 2008 states that working hours were Monday to Sunday from 8.00 am to 5.00 pm. The Claimant led no evidence to contradict this clause in his contract of service.

Finally, the prayer lacks essential particulars and is disallowed.

#### **Service pay for 10 years Kshs.80,000/=**

57. The 1<sup>st</sup> Respondent tendered no evidence to prove that he was deducting and remitting NSSF contributions as required by law.



58. The Claimant is accordingly awarded service pay from April 1, 2008 to the date of termination at rate not lower than 15 days for each completed year of service.
59. The Claimant tendered no evidence on how his employment with Wine Masters Limited ended. The duration cannot be included in the computation of dues against the Respondents as that relationship ended on a particular date.

### **Damages for unfair dismissal**

60. Having found that termination of the Claimant's employment was unfair for want of procedural propriety, the Claimant is entitled to the remedy under section 49(1) (c) of the Employment Act, 2007 and as ordained by section 49(4) of the Act, the court has considered the following;
  - i. The Claimant was an employee of the Respondent from April 1, 2008 to the date of termination in 2013, a period of approximately 5 years.
  - ii. The Claimant did not express his wish to continue working for the Respondents nor appeal the decision of the 1<sup>st</sup> Respondent.
  - iii. It is not in contest that a theft took place at the Respondent's house/office and the Claimant was a suspect but was subsequently acquitted.
  - iv. The Claimant appear to have had a good working relationship with the 1<sup>st</sup> Respondent as evidenced by the fact that they had worked together since June 2004 at Wine Masters Limited and even after employment with Wine Masters Limited ended, the Claimant was retained by the 1<sup>st</sup> Respondent.
61. In the circumstances, the court is satisfied that the equivalent of 2 months' salary is fair.
62. In conclusion, judgement is entered for the Claimant against the Respondent as follows;
  - a.. Declaration that termination of the Claimant's employment was unfair.
  - b. One month's salary in lieu of notice.
  - c. Service pay for 5 years at the rate of not less than 15 days for each completed year of service.
  - d. Equivalent of 2 months' salary.
  - e. Costs of this suit.
  - f. Interest at court rates from the date hereof till payment in full.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF MARCH 2023**

**DR. JACOB GAKERI**

**JUDGE**

**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 Civil 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.

**DR. JACOB GAKERI**

**JUDGE**

