



Tuimising v Lule (Cause 1688 of 2017) [2023] KEELRC 663 (KLR) (10 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 663 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1688 OF 2017
SC RUTTO, J
MARCH 10, 2023

BETWEEN

KIPKOECH TUIMISING CLAIMANT

AND

PROF GODFREY NSEKERO LULE RESPONDENT

JUDGMENT

1. The claimant instituted the instant suit vide a Memorandum of Claim dated 18th August, 2017, through which he avers that he was employed on or around June, 2014 by the respondent, to serve as a night watchman at his Lavington residence. That he was tasked with washing the respondent's motor vehicle every morning on the understanding that the respondent would pay him kshs 300/= for the said services daily. He avers that the respondent dismissed him from employment orally on 12th July, 2017. He has termed his dismissal as unfair and unlawful hence claims against the respondent several reliefs including salary in lieu of notice, payment for untaken leave days, accrued house allowance, unpaid salary for 12 days worked in the month of July, 2017, overtime for days worked during public holidays, payment for washing the respondent's motor vehicle and compensatory damages for unlawful termination.
2. Opposing the claim, the respondent avers that the claimant was engaged as a casual worker at his residence at the rate of kshs 366/= per day. That it was understood that the claimant's job description was that of a casual worker. That on 12th July, 2017, the claimant was in total drunken stupor and refused to open the gate for him. The respondent further denies that the dismissal of the claimant was without reasons and that the same was procedurally unfair. On this account, the respondent has asked the Court to dismiss the suit with costs.
3. During the hearing which took place on 24th May, 2022 and 6th October, 2022, both sides called oral evidence.



Claimant's case

4. The claimant took the stand and testified in support of his case. He started by adopting his witness statement together with the bundle of documents which were filed with the claim, to constitute his evidence in chief.
5. It was the claimant's testimony that on 12th July 2017 at 9.00 p.m, the respondent arrived at his residence and he opened the gate for him. That the respondent parked his motor vehicle and told him that his employment had been terminated with immediate effect and that he should hand over his torch and apron to his colleague by the name Mr. Sigei, and leave the premises immediately. That he pleaded with the respondent to allow him stay at the gate until the following day since it was late and he could not go back to his house at that time.
6. That on the 14th July 2017, at around 6.30 am, he went back to the respondent's residence with the apron. That he waited at the gate for a few minutes and when the respondent saw him, he asked him to hand over the apron to Mr. Sigei and leave. That he tried to ask the respondent about his terminal benefits and salary for the month of July, 2017 but he (respondent) instructed Mr. Sigei to lock him outside the gate.
7. That the respondent did not issue him with any notice and never gave him any reasons for the said dismissal. That todate, he does not know why he was dismissed. That he was also not given a chance to defend himself and or to be heard. That he therefore believes that his dismissal was unlawful and unfair.
8. That while working for the respondent, he was forced to work from 5:30 p.m. until 7:00 a.m. daily including all public holidays without any rest day per week yet he was not paid any overtime. That at the time of his dismissal, he had accumulated a total of 5,531 ½ overtime hours from days worked on rest days and 405 overtime hours from days worked all public holidays.
9. That he was also entitled to be paid a minimum wage of ksh.12, 221.10 as from 1st May, 2015 but his salary was never raised by the respondent. That he therefore claims the underpayment of kshs. 1,221.10 from 1st May 2015 to the time of termination of his employment.
10. That he was further not allowed to proceed on leave except in the year 2016 when he went on leave for 21 days. That he therefore claims accrued wages in lieu of 42 untaken leave days equivalent.
11. That he was also not provided with a house neither was he paid any house allowance. That he was also not enrolled as a member of any provident fund or NSSF and as such, he claims service charge at the rate of half of his minimum salary for each year he served the respondent.

Respondent's case

12. The respondent testified in support of his case and called three other witnesses. He was the first to go. It was the respondent's testimony that the claimant was engaged as a casual worker at his residence at Lavington at the rate of Kshs 366/= per day, which was above the prescribed minimum wage.
13. He denied the existence of any agreement between himself and the claimant for the payment of Kshs 300/= for washing his car. That the claimant washed the car as and when required as part of his casual duties and there was no agreement for extra payments outside of the daily rate.
14. That on 12th July 2017, he arrived home at around 7:30 -8:00 pm and found the gate to his residence locked. That he hooted and also knocked on the gate but there was no response. That he drove to Lavington Mall where he called another worker, Mr. Franklin Sigei, who opened the gate for him. That the claimant was in total drunken stupor.



15. That in the morning, he called the claimant and cautioned him in the presence of Mr. Sigei. It was his further testimony that on several occasions, the claimant had locked him outside his residence when he was too drunk to open the gate.
16. That on several occasions, he had requested Mr. Michael Kiprono Kirui to counsel the claimant with regards to his drunkenness, lapses and carrying out his work diligently.
17. He denied that the dismissal of the claimant was without reason and that the dismissal was procedurally unfair and or unlawful as alleged. It was his evidence that the claimant was summarily dismissed for drunkenness at work and he duly followed the procedure for summary dismissal.
18. The respondent further told the Court that the claimant had off days and would alternate with other workers in shifts and worked within the statutorily prescribed hours.
19. He further denied the claimant's assertions that he worked overtime or on holidays as alleged in light of his nature of employment and terms of engagement.
20. That during the subsistence of his employment, the claimant would take leave days as and when they fell due and when he so required. That whenever the claimant took his leave he would in turn hire a casual relief worker.
21. He further stated that the daily rate paid in the sum of Kshs 366/= per day worked was negotiated and agreed and the claimant duly accepted the terms of employment as a casual worker.
22. That he paid the claimant's remuneration for the 12 days worked in July 2017 in the presence of Mr. Franklin Sigei and he has no outstanding dues to the claimant.
23. The respondent asked the court to dismiss the claimant's suit against him with costs.
24. Mr. Michael Kiprono testified as RW2. It was his evidence that he has worked for the respondent since 1998, first as a watchman and subsequently as a grounds man. That he is the one who introduced the claimant to the respondent. That he acted as the supervisor and coordinator of the casuals and in his aforesaid capacity, he can testify that the claimant is a heavy drinker of alcohol and on several occasions and instances, he reported to his place of work while under the influence of alcohol. That together with the respondent, they had warned the claimant several times to stop reporting to work while under the influence of alcohol.
25. That he is also aware that the claimant had on several occasions locked out the respondent from his residence by refusing to open gate or not heeding calls to open the gate when called upon to do so as he would be dead drunk.
26. That the respondent had on various occasions informed him of the claimant's unbecoming behavior and requested him to counsel the claimant.
27. That on 12th July 2017, the claimant went to work drunk and refused to open the gate for the respondent asking him who he was in total drunken stupor.
28. That the claimant was confronted by the respondent in the presence of Mr. William Rono on why he came to work drunk and the failure to perform his duties owing to drunkenness.
29. It was his evidence that the claimant was summarily dismissed due to reporting to work drunk and failing to perform his duties because of drunkenness.
30. Mr. William Kipchirchir Rono testified as RW3. He identified himself as a watchman at the respondent's residence. That he has worked for the respondent for the last 9 years and knows the



claimant as they were colleagues. That the claimant was engaged as a casual worker at the respondent's residence in Lavington.

31. He testified that the claimant is a heavy drinker of alcohol and on several occasions and instances, he reported to his place of work while under the influence of alcohol. That the claimant's drunkenness at work greatly interfered with his work as he could not perform his duties while drunk. That on several occasions, he counselled the claimant to stop reporting to work drunk.
32. Mr. Franklin Sigei testified as RW4. It was his evidence that he has worked for the respondent since 2016, as a watchman at his residence hence knows the claimant. That the claimant is his former colleague and he can testify first hand that he is a heavy drinker of alcohol.
33. That he is aware that on several occasions and instances, the claimant reported to his place of work while under the influence of alcohol. That together with the respondent, they had warned the claimant several times to stop reporting to work while under the influence of alcohol.
34. That he is also aware that the claimant had on several occasions locked out the respondent from his home by refusing to open the gate or not heeding calls to open the gate when called upon him to do so, as he would be dead drunk.
35. That he is aware of the circumstances leading to the claimant's summary dismissal from his job on 12th July, 2017. That on the material day, the claimant went to work drunk and refused to open the gate for the respondent asking who the respondent was, in total drunken stupor.
36. That the claimant was confronted by the respondent in his presence as to why he reported to work drunk. That the claimant was summarily dismissed due to failure to conduct his duties owing to drunkenness at work and was paid kshs 5,000/- in his (RW4) presence.

Submissions

37. It was submitted on behalf of the claimant that the respondent's witnesses admitted that he worked for the respondent for a continuous period of over three years. That this does not accord with lawful terms of engagement of casual workers. The case of *Silas Mutwiri vs Haggai Multi- Cargo Handling Services Limited* (2013) eKLR was cited in support of this position.
38. The claimant further submitted that the meeting or hearing contemplated by Section 41 of the *Employment Act* does not contemplate a confrontation between an employer and employee but an engagement at which the employee is accorded an opportunity to defend himself on the allegations against him. It was the claimant's further submission that his termination was procedurally unfair for want of the requisite notice and hearing, hence unfair within the meaning of section 45 of the *Employment Act*. That the dismissal was for no reason or contemplated in law and was therefore substantially unfair. The claimant further cited the cases of *Mary Chemweno Kitui vs Kenya Pipeline Company Limited* (2014) eKLR and *John Rioba Mugo vs Riley Falcon Security Services Limited* (2016) eKLR.
39. On the other hand, the respondent submitted that the claimant was a drunkard who had been given several warnings for turning up to work drunk and not performing his duties. That his state of intoxication rendered him incapable of performing his duties hence a misconduct under Section 44 of the *Employment Act*. In support of this position, the cases of *Daniel Mwanzau Nzioka vs Brinks Services Limited* (2020) eKLR and *Charles Asango Lubia vs Brookside Dairy Limited* (2021) eKLR were cited. That the reason for termination was valid and the respondent produced sufficient evidence to support the reason and circumstances of termination.



40. It was further submitted by the respondent that he had provided sufficient evidence that the claimant was questioned in the presence of a colleague and he admitted the offence. That the claimant did not controvert this position. The case of Janet Nyandiko vs Kenya Commercial Bank Limited (2017) eKLR was cited to buttress this argument.

Analysis and determination

41. I have considered the pleadings, the evidentiary material placed before me and the submissions on record and find the issues falling for the Court's determination to be:
- a. Whether the claimant was a casual employee.
 - b. Whether the claimant's termination was unfair and unlawful.
 - c. Is the claimant entitled to the reliefs sought?

Nature of employment relationship?

42. This issue was raised by the respondent in his pleadings as he averred that he engaged the claimant on a casual basis. Be that as it may, he did not submit on the issue. Be that as it may, as the issue was pleaded, I am enjoined to address the same.
43. A casual employee is defined under Section 2 of the *Employment Act*, to mean "a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time."
44. What this means is that a casual employee is engaged for not more than twenty-four hours at a time. Therefore, the engagement is intermittent and does not assume permanency. In most cases, casual employment is dependent on availability of work. In other words, tomorrow is not assured hence the engagement is not continuous.
45. The claimant testified that he started working for the respondent with effect from 1st June, 2014 until his termination on 12th July, 2017. RW3 testified that he found the claimant working at the respondent's residence. From the oral testimony of the claimant and the respondent's witnesses, he was employed by the respondent to serve as a night watchman.
46. It can thus be inferred that the nature of the claimant's work was one that was to be performed continuously beyond 24 hours at a time. It does not sound plausible that the claimant would serve as a night watchman on a casual basis. Besides, none of the respondent's witnesses testified that the claimant's services were intermittent and his employment was terminable at the end of each day. The inference that can be drawn from the testimony of the respondent's witnesses is that the claimant worked for the respondent continuously upto 12th July, 2017 when his services were terminated.
47. What's more, pursuant to Section 10 (7) of the *Employment Act*, the respondent being the employer, was under an obligation to prove the fact that the claimant was a casual employee. The said statutory provision is couched as follows: -

"if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer."



48. This position was reiterated by the Court of Appeal in Jackson Muiruri Wathigo t/a Murtown Supermarket vs Lilian Mutune [2021] eKLR where it was held that: -

“[15]. In any event, as per the respondent, the burden lay with the appellant by virtue of Section 10(7) of the *Employment Act* to establish the terms of her employment. His failure to render any employment record meant that the appellant had not established his allegations that she was a casual employee. Besides, the respondent submitted that having worked for the appellant from August, 2010 until November, 2013, the appellant was estopped by Section 37 of the *Employment Act* from claiming that she was a casual employee.”

49. The bottom line is that it was not sufficient for the respondent to submit that the claimant was a casual employee and fail to produce relevant evidence to back up that position.

50. Therefore, being the party responsible for maintenance of employment records under Section 74 of the *Employment Act*, the respondent was under an obligation to prove by way of evidence, that the claimant was engaged intermittently and not for a continuous period exceeding three months. Indeed, under cross examination, the respondent testified that he did not maintain employment records.

51. In absence of evidence, I am led to conclude that the claimant was engaged on a term contract as opposed to a casual basis.

52. That said, was the claimant’s termination unfair and unlawful?

Unfair and unlawful termination?

53. The determination of this issue turns on the provisions of section 41,43 and 45 of the *Employment Act*. Essentially, an employer must prove that there was substantive justification to warrant the termination of an employee and that the same was undertaken procedurally. This is the standard to be applied in determining whether an employee’s termination from employment was fair and lawful.

54. I will first deal with substantive justification, which is addressed under Section 43 and Section 45(2) (a) & (b) of the *Employment Act*. In this regard, Section 43(1) requires an employer to prove the reasons for termination, and in absence thereof, such termination is deemed to be unfair. Under Section 43(2), such reasons are matters the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the services of the employee.

55. On its part, Section 45 (2)(1) and (b) provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee’s conduct, capacity or compatibility; or based on its operational requirements.

56. Back to the case herein, the respondent testified that the grounds for which the claimant was terminated was intoxication during his working hours. Pursuant to Section 44(4) (b) of the *Employment Act*, intoxication at the work place is one of the grounds for summary dismissal. It provides as follows: -

“(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause,...(b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;

57. The respondent testified that the claimant was drunk on the night of 12th July, 2017. The respondent’s testimony was corroborated by RW4 who stated that on the material day, the claimant was so intoxicated to the extent that he failed to open the gate for the respondent despite him hooting severally.



That eventually, it was him (RW4) who opened the gate for the respondent. Further testifying under cross examination, RW4 stated that the claimant reported for work while intoxicated and proceeded to sleep.

58. In addition, all the respondent's witnesses testified that the claimant was always intoxicated while on duty and had been cautioned on several occasions in that regard. It is notable that the testimony of the four respondent's witnesses with regards to the claimant's intoxication, was consistent and overwhelming.
59. The nature of the claimant's work required him to be alert and vigilant at all times and no doubt, intoxication could impair his ability to perform his work efficiently. Indeed, the said intoxication on the part of the claimant while on duty posed a risk to the respondent and his property.
60. In the circumstances, it is my finding that the respondent has proved to the requisite standard that he had fair and valid grounds to terminate the claimant's employment hence his termination cannot be said to be unfair.
61. Turning to the question of procedural fairness, Section 45(2)(c) of the *Employment Act*, provides that for termination to be fair, it ought to be in line with fair procedure. In this respect, Section 41(1) of the *Employment Act* requires an employer to accord an employee a hearing prior to termination.
62. In this case, the respondent stated that he called the claimant following the incident of 12th July, 2017, and in the presence of RW4, explained to him the reasons for which he was terminating his employment.
63. What is notable in this case is that the termination occurred in a domestic set up hence to a great extent, was characterized by informality. Therefore, it is almost impracticable to have a written notice and a record of minutes to prove that indeed, the claimant was taken through a disciplinary hearing.
64. As stated herein, RW4 testified that he was present when the respondent was engaging the claimant in regards to the transgressions alleged against him. This corroborated the testimony of the respondent.
65. To this end, I am satisfied that in the circumstances, the respondent complied with the spirit of Section 41 of the *Employment Act* hence the claimant's termination was not unlawful.

Reliefs?

66. As the court has found that the claimant's termination was not unfair and unlawful, the claim for notice pay, compensatory damages and service pay collapse.
67. With regards to the underpayments, the claimant testified that he was paid the sum of kshs 11,000.00. Cross examined, RW1 stated that the claimant's monthly salary was kshs 11,346.00. Pursuant to Legal Notice No. 116 of 2015, the claimant being a night watchman and stationed within Nairobi, was entitled to earn the sum of Kshs 12,221.10 with effect from 1st May, 2015. Therefore, this confirms that he was paid below the prescribed minimum wage hence was underpaid. He is therefore entitled to the sum underpaid.
68. The claim for house allowance also succeeds, as Legal Notice No. 116 of 2015 expressly provides that the minimum wage payable is only in respect of basic salary and is exclusive of house allowance. This is also founded on the provisions of section 31 (1) of the *Employment Act* which provide as follows:

“(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in



addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.”

69. The Court of Appeal in the case of Grain Pro Kenya Inc. Ltd vs Andrew Waithaka Kiragu [2019] eKLR determined the rate payable as house allowance as follows; “To us 15% is reasonable percentage that an employee spends from part of a salary to pay house rent.” This rate is also in tandem with the General Wages Order.
70. The claimant has also prayed for salary for 12 days worked in July, 2017. The respondent stated that upon dismissing the claimant, he paid him kshs 5,000/= being salary for the days worked and that the claimant signed on a book acknowledging payment. Nonetheless, the respondent did not produce the said book in evidence. This was crucial evidence as it would have proved that the claimant was paid his salary for the days worked in that month. In absence of evidence, the Court returns that the claimant is entitled to said salary.
71. With regards to the claim for leave, the claimant admitted taking leave in 2016 for 21 days. However, he stated that he did not take leave in 2017. On his part, respondent admitted that he did not have the leave records in respect of the claimant. Therefore, the claimant is entitled to prorated leave for 2017. I must also add that pursuant to Section 28(4) of the *Employment Act*, the claimant can only claim leave for 18 months preceding his termination. Therefore, the claim for leave days dating back beyond 2016, is declined.
72. The claim for overtime also collapses for want of proof. On this issue, I will echo the determination in the case of Rogoli Ole Manadiegi vs General Cargo Services Limited (2016) eKLR, where the Court expressed itself as follows: -
- “It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”
73. In light of the above decision which I wholly adopt, the claimant was bound to prove entitlement to the claim for overtime. Having failed to do so, the claim to this extent fails.
74. The Court further declines to award the claimant his claim for washing the respondent’s motor vehicle. There is no evidence that this constituted part of a separate arrangement between the parties. Besides, it is not clear how the claimant arrived at the rate of kshs 300/=. This claim also collapses for want of proof.

Orders

75. In the final analysis, the claim partially succeeds and the claimant is awarded:-
- Unpaid Salary for 12 days worked in July, 2017, being Kshs 4,888.40.
 - Underpaid salary from 1st May, 2015 upto 30th June, 2017 for 26 months being (kshs 12,221.10-kshs 11,000.00) hence kshs, 31,748.60.
 - Unpaid house allowance calculated at the rate of 15% of 12, 221.10 for 26 months being Kshs 47,662.29.



- d. Untaken leave days being kshs 4,277.35
- e. The total award is Kshs 83,688.24.
- f. Interest on the amount in (e) at court rates from the date of Judgement until payment in full.
- g. The claimant shall also have the costs of the suit.

76. The claimant shall also be entitled to a certificate of service in line with section 51 of the Employment Act.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Malonza instructed by Mr. Tanui

For the Respondent Mr. Ochieng

Court Assistant Abdimalik Hussein

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 had 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.

STELLA RUTTO

JUDGE

