



**Macharia v Chaju Builders Limited (Cause E089 of 2021)
[2023] KEELRC 646 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 646 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E089 OF 2021
CN BAARI, J
MARCH 9, 2023**

BETWEEN

ANTHONY MBUGUA MACHARIA CLAIMANT

AND

CHAJU BUILDERS LIMITED RESPONDENT

JUDGMENT

1. The claimant's Memorandum of Claim is dated December 28, 2021, and filed on December 29, 2021. The claimant seeks an order for payment of three month's salary in lieu of notice, 12 month's compensation for wrongful termination, payment for the remainder of his contract, salary for the month of October, a certificate of service and Costs and interests of this suit.
2. The respondent entered appearance on February 3, 2022, and subsequently filed a Response to the Memorandum of Claim on April 6, 2022, and further with the leave of the court, filed an amended statement of response and a counter claim dated August 23, 2022.
3. The claimant's case was heard on October 24, 2022, where he testified in support of his case, adopted his witness statement and produced documents filed as his exhibits in the matter.
4. The respondent's case was heard on November 15, 2022 and December 14, 2022. The respondent presented a Mr. Eric Otieno Odinga, and a Ms. Liz Ng'ang'a to testify on its behalf. The two witnesses adopted their statements, and produced bundles of documents filed in support of the respondent's case.
5. Both parties filed submissions in the matter.

The Claimant's Case

6. The claimant's case is that he was employed by respondent in the month of January 2021, as a Project Manager earning a gross salary of Kshs.165,000.00 and a net salary of Kshs.135,511.00.



7. The claimant states that he signed a two-year employment contract with the respondent but the respondent never availed a copy of the Contract to him.
8. The claimant states that sometime in the month of October, 2021, he was asked by one Eric Oginga, the Projects Director and Coordinator, to hand over his duties to a Mr. Abuya without any reasons. It is the claimant's further case that after handing over his office files and documents to the said Mr. Abuya, he was told orally by Eric Oginga that his employment had been terminated.
9. The claimant states that no notice or reason was given for the termination of his employment and nor was he given any formal communication on the termination.
10. It is the claimant's case that when his employment was terminated, he was not paid his October, 2021 salary nor paid in lieu of termination notice.
11. The claimant states that the respondent did not follow the law as laid down in the *Employment Act* regarding termination of an employee, and thus he was unlawfully terminated.
12. The claimant states that his termination was unlawful, and the respondent is liable to compensate him as provided for under the *Employment Act*, 2007.
13. The claimant states that due to the unlawful termination, he is entitled to three month's pay in lieu of Notice and compensation for wrongful dismissal.
14. The claimant states that since he had only worked for 10 months as per his contract with the respondent, he is entitled to be paid for the remainder of the whole contract since he was wrongfully dismissed.

The Respondent's Case

15. The respondent's case is that it employed the claimant for a fixed term contract of one year commencing on January 7, 2021, to January 6, 2022.
16. The respondent states that the claimant was hired as a Technical Projects Director with the respondent Company and assigned to supervise construction of a tuition block at Rongo University.
17. The respondent further states that the claimant did not perform his duties as expected, and that his actions caused the respondent Company great losses. It is the respondent's further case that the actions of the claimant caused delays in its project at Rongo University, which caused it to lose huge sums of money.
18. It is the respondent's case that several warnings were issued to the claimant verbally, and that he wrote a letter dated October 23, 2021, where he regretted his actions and promised to improve on his performance and minimize the losses incurred by the respondent's Company.
19. It is the respondent's case that when the claimant absconded duty, it engaged the services of a professional to assess the damage caused to the Rongo project as a result of the claimant's actions, and whose results concluded that the Company had to incur more expenses to correct the defects caused by the claimant's inaction. The respondent states that it now seeks that the claimant compensates the Company for the losses incurred.
20. It is the respondent's further case that it incurred losses amounting to Kenya Shillings Two Million One Hundred and Twenty-Two Thousand Five Hundred and Fifty Only (Kshs.2,122,550.00). The respondent states that the particulars of loss occasioned by the claimant include the cost of repair on



staircase at Kshs.651,800.00, repairs on the ramps at Kshs.620,000.00, and reinforcement on columns beams and slab at Kshs.850,750.00 all amounting to Kshs.2,122,550.00

21. The respondent states that on October 15, 2021, a show cause letter was written to the claimant to explain why disciplinary proceedings should not be commenced for his acts of negligence of duty at the site in Rongo, where he was in charge of supervision of the ongoing development works.
22. It is the respondent's position that the claimant responded to the show cause vide a letter dated October 23, 2021, and that management was in the process of considering his response when he absconded duty on November 1, 2021, and never reported back to work.
23. The respondent states that it did not terminate the claimant, but that the claimant absconded duty when he noticed that investigations were being commenced on the losses that he occasioned the company, and that he prematurely left employment.
24. The respondent states that the claimant opted to leave office, and did so while in possession of the Company properties including, a laptop, pro book and a tablet which he is yet to handover to the respondent. The respondent further states that the claimant's salary for October, 2021, is still withheld pending his clearance with the respondent's office and handing over of the company properties in his possession.

The Claimant's Submissions

25. It is the claimant's submission that he was never given any explanation for his termination or a termination notice even after calling his supervisor, and the Human Resource Manager who admitted communicating to the claimant in her witness statement.
26. The claimant submits that the contract of service between himself and the respondent ought to have been complied with, but instead, the respondent acted in a rush and in an extremely inconsiderate manner, throwing all the requirements of the law in the haste to end his employment.
27. The claimant urges this court to find that he was unlawfully terminated due to the premature way in which his contract was ended.
28. The claimant submits that the respondent failed to follow the due processes of the law on termination and that he has proved a case of unfair and unlawful termination, and deserves the remedies sought in the claim.

The Respondent's Submissions

29. It is submitted for the respondent that the claimant absconded duty and was never unlawfully, unprocedurally and unfairly dismissed from employment.
30. The respondent further submits that the claimant absconded duty and he thus cannot be entitled to compensation as prayed for in his memorandum of claim.
31. The respondent submits that the claimant provided no evidence on where and how his termination took place, and did not attribute any wrongdoing on the respondent.

Analysis and Determination

32. I have considered the pleadings, the witnesses' testimonies and the Parties' written submissions. The issues that fall for determination are:
 - i. Whether the claimant was unfairly terminated.



- ii. Whether the claimant is entitled to the reliefs sought
- iii. Whether the respondent is entitled to the reliefs under the counterclaim.

Whether the Claimant was unfairly terminated

- 33. A termination is unfair where the employer fails to adhere to the twin tenets of procedural fairness and the substantive justification for a termination/dismissal. To achieve the procedural and the substantive fairness threshold, the employer must comply with the provisions of sections 41, 43, 45 and 47(5) of the *Employment Act*, 2007.
- 34. Section 41 of the *Employment Act*, demands that an employer before terminating the services of an employee on the grounds of misconduct, poor performance or physical incapacity, explains to the employee, in a language the employee understands, the reasons for which termination is being considered. (See *Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd* [2013] eKLR).
- 35. The claimant's position is that his supervisor instructed him to handover his duties to one Mr. Abuya, and consider his services terminated. The Respondent on its part contends that it did not terminate the claimant, but that the claimant absconded duty and never returned to work.
- 36. The respondent's witness number 2(RW2), who is the Human Resources Manager of the respondent told the court that the claimant tried to conduct her in the period he was not at work but that she did not respond because she was away on leave. It is her further evidence that RW1 did not tell her that he had assigned the claimant's work to someone else.
- 37. In my view, the admission by the respondent's Human Resources Manager that the claimant's duties were assigned to someone else, corroborates the claimant's assertion that his supervisor asked him to hand-over his duties and consider himself terminated.
- 38. Although the respondent told the court that the claimant was issued with a show cause letter and which he responded to, RW2 on cross-examination, told the court that the show cause letter was not served upon the claimant. Indeed, no evidence was produced to show that the Respondent attempted a disciplinary process against the claimant.
- 39. In an email by the claimant to the respondent's Human Resource office, and copied to his supervisor, the claimant informed that he was verbally instructed to handover his duties and that he had been relieved of his duties. RW2 admitted not having responded to the claimant's email and only stating that she was on her annual leave at the time and even when she resumed duty a few days later, she still did not respond to the claimant's email.
- 40. To simply require an employee to hand-over his duties and leave his job, violates the requirements of section 41 of the *employment Act*. In *Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd* [2013] eKLR, the court observed as follows:

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.



Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

41. The claimant was according to the evidence before court relieved of his duties without adherence to fair procedure and without being informed of the reasons for his termination.
42. I find and hold that the claimant was unfairly terminated.

Whether the Claimant is entitled to reliefs Sought

43. The claimant seeks an order for payment of three month’s salary in lieu of notice, 12 month’s compensation for wrongful termination, payment for the remainder of his contract, salary for the month of October, a certificate of service and Costs and interests of this suit.

Three Month’s Salary in lieu of notice

44. The claimant has not justified the basis upon which he seeks to be paid three months salary in lieu of notice. It is however evident that he was not given notice prior to his termination.
45. In the absence of an agreement giving three months salary in lieu of notice, the claimant is hereby awarded the statutory one-month salary in lieu of notice.

12 Months’ Compensation for Wrongful Termination

46. A determination that the claimant was unfairly terminated, entitles him to compensation for the unfair termination. (See *Benjamin Langwen v National Environment Management Authority* (2016) eKLR.)
47. In *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR the court pointed out that an award of the maximum of 12 months pay must be based on sound judicial principles, and that the trial judge must justify or explain why a claimant is entitled to the maximum award.
48. Although the claimant contends that he was on a two-year contract of service, the respondent denied this and further asserted that the claimant was on a one-year fixed term contract. This would imply that the remainder of the claimant’s contract was only three months at the time of his termination.
49. Considering the period the claimant would have continued in the service of the respondent, but for the termination, together with his length of service, I deem an award of four months’ salary sufficient compensation for the unfair termination and is hereby awarded.

Whether the respondent is entitled to the reliefs under the Counterclaim

50. The respondent filed a counterclaim seeking compensation for losses allegedly occasioned by the claimant’s negligence of duty.
51. Ms. Ng’ang’a (RW2) told the court that the claimant joined the subject project mid-way, as the project was already continuing, and was at different phase when the claimant took it over. It is her further testimony that she cannot confirm that it was the claimant’s mistake that the project stalled.
52. A letter dated March 1, 2021, produced by the claimant addressed to the respondent, indicates that a proposal was being sought on the methodology for undertaking remedial works on the Rongo project’s stair cases, columns, ramps and support beams. These are the same defects that the respondent attributes to the negligence of the claimant, yet this was just two months into his contract. A



second letter dated July 15, 2021, goes on to declare the works on the projects condemned for poor workmanship.

53. Although the claimant was already a few months into his contract when the letter of July 15, 2021 was written, the project was already evidently at an advanced stage when the claimant joint the employ of the respondent.
54. In my view, the claimant found works that had been poorly done, and the respondent expected that the clamant would pull a miracle to correct the defects which seem to have been far reaching.
55. The court further notes that the respondent filed an application seeking leave to file the counter claim on July 14, 2022. The suit herein was lodged on December 29, 2021. This in my view, confirms the claimant's assertion that the counterclaim is nothing but an afterthought.
56. The losses incurred by the respondent have not been sufficiently proved to have been occasioned by the claimant. The losses cannot therefore justifiably be placed on the shoulders of the claimant.
57. In the circumstances, I find the counter claim lacking basis, and only intended to shield the respondent from liability arising from the way it terminated the claimant. The Counterclaim is dismissed with costs.
58. In whole, the court makes orders that: -
 - i. The claimant's termination is unfair
 - ii. The respondent to pay the claimant four months' salary as compensation for the unfair termination at Kshs. 660,000/-
 - iii. The claimant be paid one month's salary in lieu of termination notice at Kshs. 165,000/-
 - iv. The claimant is awarded salary for the month of October, 2021 at Kshs. 165,000/-
 - v. The claimant clears with the respondent within 14 days of this judgment and hands-over any property in his possession belonging to the respondent.
 - vi. The respondent's Counterclaim is dismissed with costs to the claimant.
 - vii. The respondent shall bear the costs of the suit.
59. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 9TH}} DAY OF MARCH, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Wanyama h/b for Mr. Wanyanga for the Claimant

Mr. Ariho present for the Respondent

Christine Omolo- C/A

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