



**Oyoo v Vrajlal t/a Avicomp Decorators Limited (Cause 950 of 2017)
[2023] KEELRC 1085 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1085 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 950 OF 2017
SC RUTTO, J
APRIL 28, 2023**

BETWEEN

STEPHENE ODHIAMBO OYOO CLAIMANT

AND

AVINASH VRAJLAL T/A AVICOMP DECORATORS LIMITED RESPONDENT

JUDGMENT

1. The claimant avers through his claim filed on 22nd May, 2017 that he was employed by the respondent as a painter with effect from 3rd March, 2008 until 6th March, 2017 when his services were unfairly terminated. The claimant has termed his termination as unfair and consequently, claims against the respondent the sum of Kshs 966,327.50 being underpayment of salaries, salary in lieu of notice, annual leave pay, gratuity pay, public holidays, rest days and compensatory damages.
2. The Claim did not go unopposed as the respondent filed a Response on 7th June, 2017 through which it averred that the claimant together with three other employees failed to report to work without any notice and or permission. The respondent further states that the claimant continued absconding work and appeared on 24th March, 2017 to deliver a letter demanding payment of the sum of Kshs 885,404.10. According to the respondent, the claimant's allegations of unfair termination have no basis. It is on this account that the respondent has asked the Court to dismiss the Claim with costs.
3. The matter proceeded for hearing on 8th November, 2022, with each side calling oral evidence.

Claimant's case

4. The claimant testified in support of his case and to start with, he adopted his witness statement to constitute his evidence in chief. He further produced his bundle of documents filed together with his Claim as exhibits before Court.



5. The claimant testified that on 30th June, 2017, he received news that he had been bereaved hence he travelled upcountry for the funeral and was therefore away from work for 7 days. He stated that the respondent verbally granted him permission to be away and even gave him Kshs 2,000.00 for his bus fare.
6. It was his evidence that when he went back to work, the respondent told him that he did not have any work for him. He considered the same as termination.
7. The claimant further denied the respondent's assertions that he had gone to work in Kericho to do some work and maintained that he was attending the funeral upcountry.
8. Concluding his testimony in chief, the claimant asked the Court to allow his Claim as prayed.

Respondent's case

9. The respondent called oral evidence through Mr. Fredrick Onyango Obunaka who testified as RW1. He told Court that at the material time, he was the claimant's supervisor. At the outset, he sought to rely on his witness statement to constitute his evidence in chief.
10. It was the testimony of RW1 that the claimant was not terminated as he has alleged. He told Court that the claimant informed him that he was bereaved and that he had to take leave of absence from work to attend a funeral. The claimant was allowed to attend the funeral but it was later discovered that he had taken three other employees to Kericho to do some work. These three employees who were Dennis Kavuo, Shadrack Kithuka and Timothy Kitheka, had been deceived by the claimant that the respondent had a client in Kericho who required their services. RW1 further testified that he came to discover this fact after the three came to complain to him that they had not been paid for the work they had allegedly done in Kericho.
11. That when the claimant returned, he asked him to write to the respondent to explain his absence from work but he refused and instead, demanded to exit the company. Therefore, the claimant was not terminated and it is him who chose to abscond work by walking away never to return. RW1 further stated that the three other employees apologized and resumed work.
12. It was his further testimony that the claimant continued to abscond work and only returned to deliver a letter demanding the sum of Kshs 885,404.10.

Submissions

13. It was submitted on behalf of the claimant that the respondent did not avail any of the three employees allegedly transported to Kericho. The claimant further argued that the respondent failed to give any reason behind the decision to terminate his employment and failed to prove that the reason for his termination was valid. In support of these submissions, the claimant placed reliance on the case of Mary Chemweno Kiptui vs Kenya pipeline Company Limited (2004).
14. On its part, the respondent submitted that the claimant did not produce any evidence to prove that he was terminated. It thus maintained that it did not terminate the claimant's services.

Analysis and determination

15. Upon considering the pleadings on record, the evidentiary material placed before me and the opposing submissions, it is evident that the Court is being called to determine the following issues: -



- i. Whether the respondent had a valid and fair reason to justify the claimant's dismissal from employment.
 - ii. Whether the claimant was subjected to due process prior to termination.
 - iii. Is the claimant entitled to the reliefs sought?
Valid and fair reason to justify termination?
16. Pursuant to Section 43 (1) of the *Employment Act*, an employer is required to prove the reasons for which it terminated an employee and in default thereof, such termination is deemed to be unfair. Closely connected to this provision is Section 45 (2) (a) and (b) which provides that a termination of employment 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 employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; ...
17. From the record, it is common ground that the claimant asked for permission to attend a funeral upcountry. It is also not in dispute that the said permission was granted. What appears to be in dispute is the manner in which the claimant utilized the said permission. Whereas the claimant avers that indeed, he attended the funeral upcountry, the respondent opines otherwise and maintains that he went together with three other employees to do some work in Kericho. Therefore, the respondent contends that the absence of the claimant was without its express permission and authority. In this regard, the respondent denied terminating the claimant's services and stated that he chose to walk away when he was asked to explain his absence.
18. On his part, the claimant testified that when he reassumed work from the funeral upcountry, the respondent informed him that there was no work for him.
19. It is worth pointing out that the claimant did not file any Reply to the Response by the respondent. Therefore, he did not controvert the respondent's assertion that upon being granted permission to attend a funeral upcountry, he traveled to Kericho to perform some private work with three of his coworkers.
20. Indeed, one would have expected that upon the claimant being confronted, with the said assertions by the respondent through its Defence, he would have put in an appropriate Reply accompanied by evidence. It was rather odd that he did not file any evidence to prove that indeed, he attended the funeral upcountry hence utilized the permission he had been given for the intended purpose.
21. Further, the claimant's assertion that he was terminated upon resuming work from the funeral does not sound plausible as it is rather odd that the same respondent who had granted him permission would terminate his services on account of being absent. Indeed, the claimant himself stated under oath that the respondent gave him Kshs 2,000.00 being bus fare to travel upcountry for the said funeral. This signified a good gesture and it is highly doubtful that the same employer would turn around and terminate his services for being away on account of the very purpose for which he was given bus fare.
22. Therefore, in as much as the claimant may have been granted permission to be away, I am led to conclude that he did not utilize the permission for the intended purpose hence gave the respondent reason to terminate his employment.



23. Accordingly, the respondent had justifiable cause to terminate the claimant's employment on account of being away without permission seeing that he did not utilize the permission granted to him as intended.
24. Having determined as such, I now turn to consider whether the claimant was subjected to due process prior to his exit from the respondent's employment.

Whether the claimant was subjected to due process

25. Having found that the claimant did not utilize the permission he was given for the intended purpose, the respondent had all right to take disciplinary action against him under the *Employment Act*, 2007. Be that as it may, there is no evidence that the respondent took any of the actions contemplated under Section 41 of the *Employment Act* upon the claimant resurfacing.
26. It was RW1's evidence that upon the claimant resuming work, he asked him to explain his absence in writing but he failed to do so and instead, walked away. Nonetheless, there was no evidence to that effect. I must point out that the notice contemplated under Section 41 of the *Employment Act* is a formal notice which should be accompanied by reason for which an employer is contemplating termination of an employee's employment. This is then to be followed by a hearing. Indeed, if at all the respondent complied with any of the requirements under Section 41, there would have been evidence to prove as much. This was not the case.
27. In light of the foregoing, it is apparent that despite having a justifiable reason to terminate the claimant from employment, the respondent did not comply with the stipulated statutory provisions, thus his dismissal was procedurally unfair.
28. I will hasten to add that the provisions of Section 41 are mandatory hence it is not upto an employer to elect whether or not to comply with the same. Such was the determination by the Court of Appeal in the case of *Postal Corporation of Kenya v Andrew K. Tanui [2019]* eKLR, thus: -

“It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with. The section provides for

“Notification and hearing before termination on grounds of misconduct” in the following manner:- “(1) Subject to Section 42 (1), an employer shall before terminating the employment of an employee, on the grounds of misconduct; poor to performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

“(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, chosen by the employee within subsection (1) make.” Section 42 (1) referred to in Sub-section (1) relates to employees on probation.

Four elements must thus be discernible for the procedure to pass muster:-

- (i) an explanation of the grounds of termination in a language understood by the employee;



- (ii) the reason for which the employer is considering termination;
- (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”

29. What this means is that the respondent was under an obligation to grant the claimant an opportunity to defend himself and give his side of the story prior to termination. In absence of any evidence, I cannot help but conclude that the said process was not undertaken at all and in default, the resultant termination was unprocedural hence unlawful within the meaning of Section 45 of the *Employment Act*.

30. Having so found, I now turn to consider the reliefs due to the claimant.

Reliefs

Underpayments

31. The claimant has laid a claim in the sum of Kshs 133,391.00 being salary underpayment over the period he was employed by the respondent. On the other hand, the respondent has denied that it underpaid the claimant. Despite this assertion, the respondent did not lead evidence to discount the claimant’s claim.

32. Under Section 10(7) of the *Employment Act*, the employer bears the burden of proving or disproving an alleged term of the employment contract. The said provision is couched as follows: -

“(7) 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.”

33. Coupled with the foregoing provision, the employer bears the responsibility of maintaining employment records under Section 74 (1) of the *Employment Act*.

34. What manifests from the foregoing statutory provisions is that the respondent being the employer in this case, was required to prove that indeed, it paid the claimant in line with the relevant minimum wage guidelines. In absence of such evidence, the Court is inclined to draw an adverse inference against the respondent and find that the claimant was paid the sum of money he alleges to have been paid during the period of his employment.

35. The claimant avers that he was employed as a painter and was paid wages at a daily rate Kshs 350/= from 2008 upto 31st December, 2009. He further states that from 1st January, 2010 his salary was increased to Kshs 375/= per day and thereafter to Kshs 495/= from 1st May, 2011, while from 1st September, 2013, his salary was increased to Kshs 600/= and thereafter to Kshs 700/= per day from 1st May, 2015.

36. Upon reviewing the relevant Legal Notices providing for the minimum wage payable to employees in the category of the claimant, it is evident that he was underpaid during certain periods hence he is entitled to the difference being the underpayment.

37. However, the claim for house allowance which has been inbuilt into the relief for underpayment, is declined as the Legal Notices are express that the daily rate payable is inclusive of house allowance.



Salary in lieu of notice

38. As I have found that the claimant was not terminated in line with fair procedure, I will award him one (1) month's salary in lieu of notice. I must point out that the claim for sixty days salary in lieu of notice has not been justified hence is declined.

Compensatory damages

39. As the Court has found that despite the fact that the respondent had valid grounds to terminate the claimant's termination, it did not comply with the requirements of a fair process, he is awarded four (4) months' gross salary in compensation as damages under this head. This award takes into account the length of the employment relationship as well as the claimant's own contribution towards the termination of his employment.

Annual leave days

40. The claimant has also sought to be paid annual leave days in respect of 2008 and 2009. This claim is denied by dint of Section 28(4) of the *Employment Act* which only entitles the claimant to any untaken leave within the last 18 months to the separation. Therefore, any leave beyond 18 months prior to separation is deemed to have abated.

Overtime pay and public holidays

41. The claimant has also prayed for 432 weekly rest days and 86 public holidays. These claims have not been particularized and proved despite being specific in nature. In this respect, the claimant ought to have particularized the period he claims to have worked overtime and during public holidays and justified the same. On this score, I will follow the determination in the case of *Rogoli Ole Manadiegi v General Cargo Services Limited [2016]* eKLR, in which 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...”

42. In the circumstances, the prayers for overtime and public holidays cannot be sustained.

Gratuity

43. The claimant has asked the Court to award him gratuity for the 9 years he served the respondent. However, the basis for this award has not been justified either by statute or by contract, hence is declined.

Orders

44. In the final analysis, I enter judgment in favour of the claimant against the respondent and he is awarded: -
- a. One month's salary in lieu of notice, being the sum of Kshs18,486.00.



- b. The sum of Kshs 78,117.00 being underpayments arrived at as follows; (kshs 397.90-kshs 350.00 x 22 months + kshs 397.90 – kshs 375.00 x 26 days + kshs 437.70-375.00 x 6 months + kshs 556.90-kshs 495.00 x 12 months + kshs 634.85-kshs 495 x 4 months + kshs 634.85-kshs 600.00 x 4 months + kshs 711.00 – kshs 700 x 10 months).
- c. Compensatory damages equivalent to four (4) months’ of his gross salary being Kshs 73,944.00.
- d. The total award is Kshs 153,909.00.
- e. Interest on the amount in (d) at court rates from the date of Judgement until payment in full.
- f. The claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For Claimant Mr. Njenga

For the Respondent Mr. Ondego

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

