



**Hillary v Ace Africa (Kenya) (Employment and Labour Relations Claim  
9 of 2019) [2023] KEELRC 993 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 993 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
EMPLOYMENT AND LABOUR RELATIONS CLAIM 9 OF 2019**

**JW KELI, J  
APRIL 27, 2023**

**BETWEEN**

**OLIVER MASINZA HILLARY ..... CLAIMANT**

**AND**

**ACE AFRICA (KENYA) ..... RESPONDENT**

**JUDGMENT**

1. The claimant following the termination of contract of employment filed statement of claim against the respondent seeking the following reliefs:
  - a. A declaration that the termination of employment was unfair , un-procedural, wrongful and illegal.
  - b. 12 month’s salary compensation for unlawful termination
  - c. In the alternative, compensation for the remainder of the contract period
  - d. Gratuity at 15 days’ pay for every year worked.
  - e. Certificate of service
  - f. Costs of the suit
  - g. Interest thereon (b) and (c)
  - h. Any other relief this Honourable court may deem fit to grant.
2. The defendant entered appearance through the law firm of Owino Kojo & Co. Advocates and filed memorandum of reply dated 5<sup>th</sup> February 2020 together with list of witnesses and list of documents of even date and the bundle of documents.



3. The defendant further filed witness statements of Augustine Imbuye Wasonga, Cyrilla Amanyanya and Dennis Amonde all dated 7<sup>th</sup> February 2020 and received in court on the 9<sup>th</sup> March 2020 and further filed witness statements on perusal were of same content and dated 21<sup>st</sup> October 2022 and received in court on the 24<sup>th</sup> October 2022 by Imbuye Wasonga, Lynn Okello and Cyrilla Amanyanya.

### **Evidence before the trial court**

#### **Claimant's case**

4. The claimant's case was heard on 6th August 2022 with the claimant as the only witness of fact, he gave sworn evidence, adopted his written statement dated 9<sup>th</sup> August 2019 produced his filed documents under list of documents dated 9<sup>th</sup> August 2019 and was cross-examined by Counsel for the defence Mr. Kojo.

#### **Defence case**

5. The defence case was heard on the 24<sup>th</sup> October 2022 where Augustine Imboye Wasonga RW1 was defence witness of fact, he gave sworn evidence, adopted his witness statement dated 21<sup>st</sup> October 2022 and produced as defence evidence documents under list of documents dated 5<sup>th</sup> February 2020 and which were marked as D-Exhibits 1-14 and was cross-examined by claimant's counsel Ms. Komora. The defence further called Lynn Akinyi Okello (RW2) and Cyrilla Amanyanya (RW3) who testified on oath.

#### **Written submissions**

6. The court gave directions for filing of written submissions after the hearing. The parties complied. The claimant's written submissions were drawn by Ndalila & Company Advocates and dated 14<sup>th</sup> February 2023. The respondent's written submissions were drawn by Owino Kojo & Co. Advocates and dated 7<sup>th</sup> March 2023.

#### **Determination**

##### **Issues for determination.**

7. The claimant in their written submissions identified the following issues for determination:-
  - a. Whether due process was followed in dismissing the claimant.
  - b. Whether the claimant is entitled to reliefs sought
8. The Respondent in their written submissions identified addressed the following items:-
  - a. Employee's conduct
  - b. Gratuity
  - c. Certificate of service
  - d. Casus Incogitati
  - e. Reasons for termination
  - f. Claimant's rejection of ADR



9. The Court having considered the issues addressed by the parties in their submissions and pleadings was of the considered opinion the issues to be addressed in the determination of the appeal was as follows:-
  - a. Whether the termination of employment of the claimant was unlawful and unfair.
  - b. Whether the claimant was entitled to reliefs sought

### **Issue 1 Whether the termination of employment of the claimant was unlawful and unfair**

10. The court in determination of the issue was guided by the provisions of section 45 of the *Employment Act* which states:- ‘Unfair termination 45(1) No employer shall terminate the employment of an employee unfairly. (2) A termination of employment by an employer 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 employee’s conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and (c) that the employment was terminated in accordance with fair procedure.’”

### **Claimant’s case**

11. The claimant averred his contract was terminated unfairly having worked diligently for 5 years , on cross examination he told the court he was not afforded hearing before the termination ( C-exhibit 5 was the letter of contract termination) and that there were no investigations or show cause letter issued to the claimant before issuance of the contract termination letter. The claimant submits that there was no notice to cause and no hearing before the issuance of letter of termination and thus the termination of the contract was unfair and to buttress his submissions relied on the decision of the court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR where the court observed: ‘ 13. There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed ...’”

### **Respondents’ case**

12. The burden of proof of the validity of reasons for termination is on the employer under section 43 of the *Employment Act* which reads:- ‘43. Proof of reason for termination (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. (2) 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.’”
13. The respondent called three witnesses. The witnesses adopted their witness statements. The defence was to the effect that the claimant’s contract was terminated on ground of gross misconduct and data fraud for taking 15 to 20 minutes in interviews to complete 1 and 1/2 to 2 hours interview. That he claimant’s job was based on delivery as per donor specifications, he had been warned on several occasions, that each child was to be interviewed for 1 hour and ½ hours as spelled in the consent from and that it was the donor who informed of the shorter interviews on the 1<sup>st</sup> July 2019 via skype call and directed removal of the claimant from the research leading to the termination of the contract the



employment being conditional to the donor funding. That the claimant was paid one month notice as per contract of employment and signed. That the donor presented report on the unethical data fraud upon complaint by the claimant dated 3<sup>rd</sup> September 2019. The termination letter was dated 2<sup>nd</sup> July 2019 (R-exhibit 2)

14. On the Employees conduct, the respondent submits that section 49(4)b of the *Employment Act* obliged the court to consider the circumstances under which the termination took place including the extent if any, to which the employee caused or contributed to his termination, section 49(9) (k) of the *Employment Act* read with section 50 of the Act obliges the court to consider ‘conduct of employee which to any extent caused or contributed to the termination.’ That the claimant admitted he forged data and that obliges he caused his termination. That it was not possible for the interview to be conducted in 6 to 14 minutes ( R-Exhibit 5 being the Questionnaire and answers document )To buttress this submission relied on the definition of term fraud under the *Black’s Law Dictionary* (7<sup>th</sup> Ed) which defines fraud as a knowing misrepresentation of the truth or concealment of material fact to induce another act and it defines a fraudulent act as conduct involving bad faith, dishonesty, a lack of integrity or moral turpitude, ‘ That the claimant breached core values of maintaining reputation of Ace Africa(K) which exposed the appellant to damaged reputation with major donors in justifying the foregoing as reasons for the termination and it is not fair to compensate his misconduct. The respondent submits that for the fraudulent reports of interviews the claimant does not deserve to be compensated and relied on the decision in *Lilian W. Mbogo -Amolo v Cabinet Secretary of Public Service and Gender and another* (2020) eKLR where the court where the court found the claimant’s employment was unfairly terminated but only awarded her a nominal Kshs 1 (one) for the violation of her right to due process and was not awarded costs. The court found she contributed to her own dismissal.
15. *Casus Incogniti* – The respondent submits that claimant’s dismissal was necessitated by the withdrawal of funds by the donor. That the conduct of the claimant greatly jeopardised the funding of the entire project and it was the donor who ordered immediate removal of the respondent from the funded project and barred him from using the gadget necessitating summary dismissal. That clause 11 of the claimant’s contract dated 01.05.2018 (Exhibit 3) stated the contract was subject to availability of funds from the donor and satisfactory performance, and the same terms applied to the renewal contract dated 02.01.2019. That the claimant was offered position in the repserch department funded by Duke University as an interviewer meaning both the claimant and the respondent were under control of the donor. That this was a case of gross misconduct.

## Decision

16. Substantive fairness. The Respondent had the obligation to justify the existence of valid reasons for the termination of employment under section 43 of the *Employment Act* by proving existence valid reasons for the termination under section 43 to wit:-
  - (i) In any claim arising out of termination of a contract the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so the termination shall be deemed to have been unfair within the meaning of section 45.
  - (ii) The reasons or reasons for the termination of a contract are the matters that the employer at the time of termination of contract genuinely believed to exist and which caused the employer to terminate the services of the employee.



17. The letter of termination of the respondent's services dated 2<sup>nd</sup> July 2019 gave the following reasons for the termination decision: -i. data fraud – you were involved in unethical data fraud involving data manipulation and data breach of research protocols outlined by National Institute of Health (NIH) who are the funders of the research project you work under.
- ii. Due assessment with the donors(funders) of research project, this breach means that Ace Africa terminates your contract with immediate effect
  - iii. your conduct is considered gross misconduct that has jeopardised the project to a great extent
  - iv. withdrawal of funds supporting your salaries by the donor leaving the organisation with no option but to terminate your contract considering there is no any other project you can be deployed to.” (C-exhibit 5)
18. RW1 Augustine Wasonga adopted his witness statement dated 21<sup>st</sup> October 2022 where it was stated that the termination was on grounds of gross misconduct namely data fraud. That in the employment contract it was clear the claimant was remunerated by Duke University and that the contract was donor dependent. That the research done by the claimant required each child be interviewed between 1 hour and 20 minutes, that the claimant took 6 to 14 minutes time, that the interview is fed into a tablet which when one opens communicates to computers in North Carolina and also detects when interview is complete, that from paragraphs J to R of the Appellant's witness statement the chronology of the events leading to the termination was given including the show cause on data malpractice by the Principal investigator , warning to the claimant, admission of liability of the claimant but he continued malpractice. That on 1<sup>st</sup> July 2019 via skype call the donor informed the respondent the claimant had once again done shorter interviews and computer analysis showed the data was fraudulent. That the donor gave condition the claimant the claimant should not be paid with the project funds leading to the termination as the funding was conditional. That upon complaint by the claimant, the donor on the 3<sup>rd</sup> September 2019 submitted a report with regard to unethical data fraud which indicated the claimant's data was substantially different from those of other researchers and the same pointed to manipulation of data in disregard to contract and constitutional principle of bests interest of child this being a project on children with emotional and mental problems.
19. The claimant stated he worked diligent for 5 years with one year contract renewals, that there was no defined time for the interviews and was not issued with notice to show cause or called for disciplinary hearing before the termination.
20. The court looked into the policy filed in court and found no stipulation of time for interviews. The court finds and determines that though there was evidence that the claimant took shorter time in comparison with other interviewers , the court finds that the employer did not inform or give evidence on required minimum time on the interviews. The reason then would not qualify as operational requirement. Consequently the court finds the reasons for the termination did not exist as valid reasons as at time of termination of the employment of the respondent. The said report by the donor was generated on 9<sup>th</sup> September 2019 post the termination hence not evidence of existence of the reasons as at time of termination as provided for under section 43 of the *Employment Act*. The court finding is consistent with its decision on similar case in Bungoma ELRC Appeal No E001 of 2020 *Ace Africa(Kenya) v Victor Shalakhya Museve*(Delivered on 20<sup>th</sup> April 2023)

### **Procedural fairness**

21. The letter of termination of the Respondent's contract stated it was immediate hence summary dismissal under section 44 of the *Employment Act* on basis of gross misconduct. The claimant led



evidence that there was no notice to show cause or hearing before the issuance of the termination letter a fact to controverted by the respondent. The letter of termination stated it was immediate termination. Procedural fairness is mandatory even in the event where the employer contemplates summary dismissal for gross misconduct under section 44 of the *Employment Act*, the hearing process would be as defined under section 41(2) of the *Employment Act* to wit:- ‘41(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, if any, chosen by the employee within subsection (1), make.’ The court upholds holding of the Court of Appeal in

22. The court upholds decision of the court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR where the court observed:-‘13. There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed ...’
23. The court similarly so held in similar case on appeal against the respondent where the claimant had not been issued with notice to show case or heard before termination of contract on same grounds in Bungoma ELRC Appeal No E001 of 2020 *Ace Africa(Kenya) v Victor Shalakha Museve*(Delivered on 20<sup>th</sup> April 2023) and upholds the decision to apply in the instant case to find the termination of employment of the claimant was unlawful and unfair.

## **Issue 2 whether the claimant is entitled to reliefs sought**

24. The remedies on finding unfair termination are as stated in section 49 of the *Employment Act* and the relevant ones in the instant case are:-‘ 49. Remedies for wrongful dismissal and unfair termination (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—
  - (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
  - (b) where dismissal terminates the contract before the completion of any service upon which the employee’s wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or
  - (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.
- (2) Any payments made by the employer under this section shall be subject to statutory deductions.’



25. In arriving at the remedy the court ought to be guided criteria under 49(4) of the Employment Act to wit:-

“49(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following— (a) the wishes of the employee;

- (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
- (c) the practicability of recommending reinstatement or re-engagement; (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
- (e) the employee’s length of service with the employer;
- (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
- (h) the value of any severance payable by law;
- (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
- (j) any expenses reasonably incurred by the employee as a consequence of the termination;
- (k) any conduct of the employee which to any extent caused or contributed to the termination;
- (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination;”

26. The respondent relied on the decision in Lilian W. Mbogo-Amolo v Cabinet Secretary of Public Service and Gender and another (2020)e KLR where the court found the claimant’s employment was unfairly terminated but only awarded her a nominal Kshs 1 (one) for the violation of her right to due process and was not awarded costs. The court found she contributed to her own dismissal. In the instant case the court found there was no evidence of minimum time required for the interviews and no notice to show cause or hearing before the termination hence the termination of contract was not based on valid reason as at time of termination and was procedurally unfair.

27. The court holds that the award for the remainder of contract is not a remedy allowed under section 49 of the Employment Act and that prayer is disallowed. The court agreed with the respondent the relevant criteria which the court should have considered was under 49(4)(e) of the Act which reads : ‘e. the employee’s length of service with the employer; (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;”

28. The court noted the contract was for one year. The contract had been renewed previously making total years of service 5 and it was possible with good performance to be renewed. The remaining period of



the contract was 6 months. The court finds the facts of the case was similar to Bungoma ELRC Appeal No E001 of 2020 *Ace Africa(Kenya) v Victor Shalakha Museve* (Delivered on 20<sup>th</sup> April 2023) and adopts the ward therein to apply in the instant case as follows:-

29. Compensation. The purpose of payment of compensation on unfair termination is not to punish the employer. In view of the remaining period of contract and the notice pay having been paid on termination the court considered that compensation for unfair termination equivalent of 3 months gross salary was sufficient and equitable compensation in the circumstances.
30. Certificate of service. The certificate of service is a statutory right of the employee under section 51 of the [Employment Act](#) and is not conditional to their exit terms. The lack of clearance by an employee is not a basis of the employer to withhold certificate of service as the certificate of service is not equivalent to clearance certificate or referral. The court finds that issuance of certificate of service to an employee on termination of service is mandatory requirement as stated under section 51 of the [Employment Act](#) to wit:- ‘51. Certificate of service (1) An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks. (2) A certificate of service issued under subsection (1) shall contain— (a) the name of the employer and his postal address; (b) the name of the employee; (c) the date when employment of the employee commenced; (d) the nature and usual place of employment of the employee; (e) the date when the employment of the employee ceased; and (f) such other particulars as may be prescribed. (3) Subject to subsection (1), no employer is bound to give to an employee a testimonial, reference or certificate relating to the character or performance of that employee. (4) An employer who wilfully or by neglect fails to give an employee a certificate of service in accordance with subsection (1), or who in a certificate of service includes a statement which he knows to be false, commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both’.
31. Costs: The appellant submit that on the 19<sup>th</sup> August 2019 they proposed to the claimant the dispute be resolved vide alternative dispute resolution mechanism but instead of responding the respondent rushed court and filed the claim on 23<sup>rd</sup> August 2019. That the claimant issued demand letter out of formality without the intention of resolving the dispute out of court. That the trial court erred in awarding costs. The court finds that in letter dated 5<sup>th</sup> August 2019 the appellant vide the counsel on record responded to the demand letter dated 19<sup>th</sup> July 2019 denying the claim and stated any suit filed would be defended. The respondent vide letter dated 6<sup>th</sup> August 2019 Racher & Amollo Advocates responded and stated they had instructions to sue which letter was received by the appellant’s counsel(page 75). On 19<sup>th</sup> August 2019 the appellant responded to the letter of 6<sup>th</sup> August proposing arbitration of the dispute under the [Arbitration Act](#). There was no evidence of response to the said proposal. It is the finding of the court that the appellant having in its letter 5<sup>th</sup> August 2019 invited the claimant to sue, the offer to arbitrate was an afterthought and coming 13 days after the claimant indicated it would sue. It is a principle of law costs follow the event. The event being the party in whose favour the decision lies gets the costs. The court finds that the costs were properly awarded by the lower court and the said award on cost is upheld.
32. The court finds gratuity was not provided for under the contract. It is not a statutory right. The prayer is denied.

### **Conclusion and disposition.**

33. The court holds that the termination of employment of the claimant was unlawful and unfair and enters judgment for the claimant against the respondent as follows:-



- a. Compensation award for unlawful and unfair termination is awarded to the claimant for equivalent of three months gross salary as per contract of employment dated 3<sup>rd</sup> January 2019 being monthly salary of Kshs 87120 /= thus award of Kshs 261,360/- subject to statutory deductions.
- b. Certificate of service to issue under section 51 of the *Employment Act*.
- c. Costs of the suit
- d. Interest at court rates from date of judgement until payment in full.

34. It is so ordered.

**DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 27TH APRIL 2023.**

**JEMIMAH KELL,**

**JUDGE.**

In the presence of:-

Court Assistant : Lucy Macheso

For Claimant : Ms. NeKshsa h/b Ms. Komora

For Respondent:- Mr. Kojo

