Mbachi v Kazuri 2000 Limited (Cause 1171 of 2018)
[2023] KEELRC 1026 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 1026 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1171 OF 2018

K OCHARO, J

APRIL 27, 2023

BETWEEN

PETER GIKANDI MBACHI ..... CLAIMANT

AND

KAZURI 2000 LIMITED ..... RESPONDENT

JUDGMENT

1. Through a memorandum of Claim dated the 6th July 2018, the Claimant sued the Respondent seeking the following reliefs:

    a) A declaration that the termination of the Claimant by the Respondent was illegal, malicious, invalid null and void, unjust, inequitable, unfair and discriminatory and an order for reinstatement to employment.

    b) A declaration that the Claimant's fundamental and basic rights under the *Employment Act* and *the Constitution* have been infringed and trampled upon by the Respondent.

    c) A declaration that the Respondent is in breach of contract and be ordered to pay up to the period the Claimant would have retired at the age of 60 years amounting to Ksh 1,944,000.

    d) The Respondent to pay the overtime, unpaid house allowance and unpaid leave.

    e) General damages for:

        i. Breach of the contract.

        ii. Loss of income.

iii. Illegal un-procedural and unfair termination of the employment.

iv. Mental anguish and psychological torture.

f) Interest on (d) and (e) above at court rates from date of unfair termination until settlement in full.

g) Costs of the suit.

h) Any further relief this honourable court may deem fit to grant.

2. The Memorandum of the claim was filed together with the Claimant's witness statement, and the documents which he intended to place reliance on as documentary evidence in support of his case.

3. Upon being served with the summons to enter appearance, the Respondent did enter appearance on the 4th August 2018 and filed his response to the memorandum of claim on the 9th May 2019.In the memorandum of reply, the Respondent denied the Claimant's cause of action and his entitlement to the reliefs sought.

4. At the close of pleadings, the matter got destined for hearing on merit as there was a joinder of issues. The matter was subsequently heard on the 8th June 2022. However, it is imperative to state that the Respondent did not present any witness to testify in support of its case.

The Claimant's case.

5. The Claimant stated that he was employed by the Respondent as a security guard in 2000 and posted to guard a residential home of one of its Directors, place where he worked up until when he was dismissed from employment.

6. The Claimant contended that vide a letter dated the 18th April 2017, the Respondent without any justifiable reason unlawfully terminated his employment. At the time of his dismissal, he was earning a monthly gross salary of Ksh.15,652.

7. The Claimant explained that the action by the Respondent was triggered by his failure to execute an employment contract that the latter had prepared. He stated that his failure to execute and return the same was on the reason that since he first came into the employment of the Respondent, he had not been issued with any written contract, therefore executing the same could mean that he was to be deemed a fresh employee, and as a result lose his benefits for the years he had worked.

8. He asserted that earlier, he together with other colleagues had written a letter dated 1st June 2007 to the Director, one Mrs. Newman for payment of their unpaid overtime worked dues and house allowance, but no payment was made.

9. Through a letter dated 16th June 2011, they demanded for written contracts, with the dates when they first came into their employments reflected as the effective dates of their employment.

10. He stated further that they on several occasions wrote to the Respondent asking for payment of compensation for their unused leave days, but the Respondent remained unmoved. The contract of employment that he refused to sign had not provided for the outstanding dues, a further reason why he declined to execute the same.

11. It was the Claimant's case that he was only paid Ksh.39,848 as his final dues. The unpaid overtime and other pending allowances, were not input in this figure. It is only in July 2015 that the Respondent started paying him house allowance.

12. It was his testimony at the hearing, that the Respondent terminated his employment without giving him a termination letter. He was never issued with any notice to show cause and an opportunity to defend himself. He was further not given a right to appeal.

13. During his service, he used to work twelve [12] hours instead of eight hours.

The Claimant's submission

14. The Claimant filed his submissions on the 15th July 2022 putting forth three issues for determination thus:

    i. Whether the Claimant was an employee of the Respondent and worked for it diligently.

    ii. Whether the termination was procedural.

    iii. Whether he was entitled to the reliefs sought.

15. The Claimant submitted that the termination of his employment was unfair and procedural. To fortify his submission that an unfair and unprocedural termination did occur against him, he cited a statement by the learned authors in Tolley's Employment Handbook,20th Edition at paragraph 53.1 at page 984 where he explained:

    ''An employer who dismisses the employee without good reason or without following a fair procedure lays itself open to a claim for unfair termination. When such a claim is brought, the employer has to establish the reason for the dismissal.... if the dismissal is found to be unfair the employer can be ordered to re-engage, reinstate or pay the compensation for the ex-employee.''

16. Considering that the termination without a justified reason and not procedural, he is entitled to the reliefs he has sought in his pleadings.

The Respondent's submissions

17. The Respondent filed its submissions on the 18th July 2022 distilling three issues for determination thus;

    i. Whether the termination was lawful and fair.

    ii. Whether the procedure was followed.

    iii. Whether the Claimant is entitled to the reliefs sought.

18. On the first issue, the Respondent submitted that sections 8,9 and 10 of the *Employment Act*,2007 creates a legal burden upon the employer to issue the employees with a written contract of employment within two months of employment where such employment commences orally and the employee retained continuously undertaking the same duties.

19. By preparing a written contract of employment and requiring the Claimant to execute the same, the Respondent was prompted by the need to comply with the stated provisions of the law, it could have been prudent therefore for the Claimant to seclude the clauses of the contract which he was not agreeable to, instead of dismissing the whole contract as he did.

20. The Respondent further submitted that by reason of the fact that the Claimant refused to execute the agreement, it was justified to dismiss him. To buttress these submissions, reliance was placed on the case of Kenya Union of Domestic, Hotels, Education, Hospital & Allied Workers v Holy Rosary Girls' Boarding Primary School [2013] eKLR where the court held

''The Claimants' refusal to sign fresh contracts was detrimental to them and they cannot lay blame on the Respondent. This is in respect to the 2nd ,3rd and the 4th Respondents. It therefore follows that the decision by the Respondent to replace the claimants for refusing to sign fresh contracts was justified.''

21. Further reliance was placed on the holding in the case of Fancy Kirui v Regional Transmission Company Limited [2018] eKLR that:

''The upshot of it is that the claimant was dully invited to sign a formal contract of employment pursuant to the law, but declined. Such conduct cannot be visited on the respondent as unlawful lockout therefore I find no because that justifies a lockout as set out under section 2 read with part 10 of the *Labour Relations Act*, 2007. Where the claimant was required as general labourer to sign a contract of service/employment on the 17th Novenber,2015 or any other day and failed to do so, the respondent as the employer met their side of the bargain and cannot be faulted for not allowing the claimant at work without written terms and conditions of engagement. The claimant thus frustrated his own employment. Such cannot be unfair termination of employment.''

22. Submitting of procedural fairness, the Respondent stated that it adhered to the mandatory provisions of section 41 of the *Employment Act*. The Claimant was called to explain his reasons for refusal to sign the new contract, however, he failed to give a reasonable explanation and thereafter a warning letter was served on him as a second chance to redeem himself which also bore no fruit. In the upshot the Respondent had no option other than terminate his employment summarily.

23. The Respondent submitted that the Claimant was not entitled to any of the reliefs sought. It submitted that the Claimant's claim for overtime is fictitious and patently untenable for it presumes that he worked overtime every single day for several years which is not humanly possible. He has not particularised the days when he worked overtime.

24. The Respondent further submitted that the Claimant's overtime was paid, consequently it cannot be the subject matter of this claim. Support for this submission was sought in the case of Otieno v South Nyanza Sugar Company Limited [2022] KLR where the court held that:

'' The payslips produced before the court indicates that the claimant was paid overtime for the months, he worked beyond working hours. For this reason, the claim for overtime pay is dismissed.''

Analysis and determination

25. Having read the pleadings, evidence on record and the submissions by the counsel, the issues for determinations are:

    i. What is the effect of the Respondent's failure to present evidence in this matter?

    ii. Whether the Claimant's employment was lawfully and fairly terminated.

    iii. Whether the Claimant is entitled to the reliefs sought.

    iv. Who should bear the cost of the suit.

    What is the effect of the Respondent's failure to present evidence in this matter?

26. As indicated hereinabove, despite the fact that the Respondent did enter appearance and file defence, it nonetheless failed to present a witness to testify in support of its defence against the Claimant's claim. The question that comes up then is, what is the effect of this on its case, and the claim herein in general. Again, and again, this Court has stated that where a party files a statement of Response/ Defence, but nonetheless fails to present evidence to prove the contents therein, the statement remains

a mere statement without any evidential value. That is how this Court shall treat the Respondent's pleadings herein.

27. Further, the *Employment Act*, 2007 places under its various sections places various burdens of proof on the employer; section 41 the burden to prove that the termination or summary dismissal was procedurally fair; section 43, the duty to prove the reasons for termination; section 45, the duty to demonstrate that the reasons were fair and valid; section 45[5] the burden to prove that the termination was with equity and justice, and section 47[5],the burden to demonstrate that the termination was justified. Legal burdens of proof are discharged by adduction of sufficient evidence, and where the party charged with the duty to discharge the burden placed forth no evidence, the inescapable conclusion shall be that he or she didn't discharge the burden. This shall be the approach this Court shall give the Respondent's position, hereinafter.

28. The Court notes that the Respondent has extensively made submissions in regard to various aspects of this matter, in a manner that the submissions appear its evidence in defence to the Claimant's case. It is at this point that it becomes imperative to warn the Respondent that submissions are never a substitute for evidence. In so stating this court is inspired by the holding in the Court of Appeal decision in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

Whether the Claimant's Employment was Lawfully and Fairly Terminated

29. It is not in dispute that the Claimant was employed by the Respondent as security guard in 2000 and posted to guard one of its Director's residential place. It was and remained the Claimant's position that there was no written contract of employment entered between the him and the Respondent up until the 30th April 2016 when the Respondent decided to reduce the employees' contracts into writing.

30. In addressing the presence of fairness or otherwise in termination of an employee's employment or summary dismissal of an employee, a court must consider two aspects, the substantive justification and the procedural fairness. The two form the total unit of fairness in termination and absence of any of them shall render the termination unfair.

31. Section 41 of the *Employment Act* 2007 provides the structure for the procedural fairness. It provides:

'' (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor 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, if any, chosen by the employee within subsection (1), make.''

32. It is trite that procedural fairness entails the duty on the employer to explain to the employee clearly the nature of the grounds for which it is contemplated that his employment be terminated, an opportunity for the employee to make representation on the grounds, and consideration by the employer of the representations before taking a decision.

33. By dint of the provision of section 45 (2), the duty to prove that there was procedural fairness in the termination or summary dismissal lies with the employer.

34. The Claimant contended that it was not explained to him why his employment was being terminated. He was not given an opportunity to explain himself on the grounds that formed basis of the Respondent's action of dismissing him from employment. Further that he was not issued with any termination letter from which the reason for the dismissal can be garnered. The Respondent didn't present any evidence in rebuttal of this evidence by the Claimant, or as proof that it adhered to the statutory procedure set out in section 41 of the Act, before it terminated the Claimant's employment.

35. It is not difficult therefore, to find that the Claimant was dismissed from his employment without adherence to the mandatory procedure stipulated in section 41 of the Act, and that the dismissal was as a result procedurally unfair.

36. In view of the above I am left with no other reason rather than the conclusion of the Claimant's termination was procedurally unfair.

37. Section 43 and 45 of the *Employment Act* speak to substantive fairness. In a dispute like the instant one, section 43 requires the employer to prove the reasons for the termination, otherwise the termination/ dismissal shall be deemed unfair by dint of the provisions of section 45 of the Act. It is imperative to state that however, that it is not enough for the employer to prove the reason[s], he/she must go an extra mile to demonstrate that the reason[s] was valid and fair as required by section 45(2) of the Act.

38. At this point it becomes imperative for the court to state that under section 43 (2), the reasons for the termination of the contract are matter that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.

39. The Claimant asserted that his failure to execute the contract of employment that the Respondent had prepared, prompted the latter to dismiss him. He contended that he declined to sign the contract, because it was wanting in some aspects, considering that prior, he had been on a contract of employment that was not. Among the aspects that singled out by the Claimant was the starting date of the contract of employment. There was no evidence by the Respondent challenging the Claimant's that the contract as prepared had contentious issues. I am persuaded by the Claimant's evidence therefore, that it had.

40. It is my unmistakable view that sections 9 and 10 of the *Employment Act* do not in any manner give the employer a blank cheque to prepare and give for execution a contract of employment and expect the execution by the employee, without him or her having any say on the terms and conditions as set out in that contract. Section 9[2] contemplates that every term of the contract has to be consented to by the employee. It provides;

> " 2. An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to [emphasis mine] in accordance with subsection [3]."

41. The Respondent submitted that it prepared a contract of employment in compliance with the provisions of sections 9 and 10 of the Act, and that if the Claimant had any issue with any aspect of the prepared contract, he could have secluded that aspect[s], instead of declining whole contract. With great respect, I find it very difficult to understand the reasoning here. How could he seclude? does it mean that he ought to have prepared another contract, excluding the contentious aspect[s], then execute the same? In my view, the point[s] that the Claimant raised before he could accept to be legally bound by the prepared contract, was valid.

42. In conclusion, I find that, without any evidence on the part of the Respondent to demonstrate the reason for the summary dismissal and that the reason was fair and valid, coupled with my finding hereinabove that the Provisions of section 9 of the Act does not contemplate that the employee executes the contract prepared pursuant thereto by the employer, without consensus having been attained on all the aspects of the contract, I conclude that the Claimant's termination was substantively unfair. I am not persuaded by the Respondent's counsel's submissions that the dismissal was justified under the provisions of section 44 of the Act. The submissions flow from no identified evidence. Furthermore, the grounds of insubordination by the claimant are not cogently justified.

Whether the Claimant is entitled to the reliefs sought

43. Having found that the termination was unfair and un-procedural, the court is now called to determine whether the Claimant is entitled to the reliefs sought.

In tackling this part, I will deal with each relief per head.

a) Reinstatement of the Claimant's employment.

44. No doubt, the dismissal of the Claimant from employment was unfair, unjust and without equity. Reinstatement of an employee who has successfully assailed his or her employer's decision to summarily dismiss him from employment or terminate his or her employment, is one of those remedies provided for under section 49 of the Act. However, the remedy is still shackled with some common law principles to an extent that it is not freely issued. A couple of conditions must be considered to be in favour of the remedy a grant of the remedy, before it is availed to the successful employee.

45. Further, there is a statutory constraint on the Court's discretion to avail the remedy. Section 12(3) (vii) of the *Employment and Labour Relations Court Act* provides that an order for reinstatement is only permitted within (3) three years after the separation. Further by dint of section 49(4) (c) & (d) of the Act, the order of reinstatement can only be issued considering its practicability and if any exceptional circumstances.

46. In the case of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR Maraga J (as he then was) stated:

'As I have said, in Kenya, reinstatement is one of the remedies provided for in Section 49(3) as read with Section 50 of the *Employment Act* and Section 12(3)(vii) of the Industrial Court Act that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance, the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. That will engender friction, which is not healthy for businesses, unless the employment relationship is capable of

withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal.

69. Under the Kenyan *Employment Act*, the factors to be taken into account when considering reinstatement are enumerated in Section 49(4) of the *Employment Act*. Those relevant to this appeal include the wishes and expectations of the employee; the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; the practicability of reinstatement; any compensation paid by the employer; and chances of the employee securing alternative employment. I would like, in particular, say something about the practicability factor."

47. The Court notes that it is now close to 6 years since the Claimant was dismissed from his employment. By dint of the provisions of Section 12[3][vii] of the *Employment and Labour Relations Court Act*, mentioned above, this Court is unable to avail the remedy of reinstatement to the Claimant.

A declaration that the Claimant's fundamental and basic rights of the employment under the labour laws and *the constitution* has been trampled.

b) The Claimant sought for the declaration above, in the reliefs section of his memorandum of claim. However, this court loses not sight of the fact that in the body of the memorandum of claim, he does not plead with specificity or at all what rights were violated and how. Further, he didn't lead evidence to demonstrate the rights, and how they were violated. This Court was left to guess, an exercise which it declines to undertake. By reason of this, this Court declines to make the declaration sought.

c. A declaration that the Respondent is in breach of the contract and be ordered to pay up to the Ksh. 1,944,000 the claimant could have earned before retirement at the age of 60 years.

48. The claimant sought an order of being paid Ksh.1,944,000 the amount he could have earned before retirement. The Claimant's claim under this head is anchored on the assumption that his employment was to last continuously without him existing until he attained the retirement age of 60 years. This assumption in my view is in ignorance of the fact that the employment and labour relations laws are structured in a manner that the contemplate separation before the retirement age on occurrence of certain events or upon certain reasons.

49. In any event, the Claimant did not demonstrate to the court the justification for the claim under this head or persuade it through its submissions that the circumstances of the instant matter are in nature that can entitle the Court to grant the relief.

d) The unpaid overtime, house allowance and unpaid leave.

50. The Respondent did not present before this court any documentary evidence that prior to the July 2015 Contract the claimant's salary was inclusive of house allowance. In fact, in order to demonstrate that the Respondent did not make available the statutory benefit of house allowance, prior to the above stated date, the claimant placed evidence before this Court clearly showing that it is a right his colleagues and him had been pursuing internally. This evidence was not challenged at all by the Respondent. I find no difficulty in agreeing with him that he all through was not given house allowance. Provision of house allowance is a statutory right under section 31 of the *Employment Act*,2007. Where it is demonstrated by an employee that it was not availed at any material time, the Court has the power to order for compensation of the unpaid sum. Considering the limitation of actions, by dint of the provisions of section 90 of the *Employment Act*, this court would only grant four years' unpaid house allowance. The Claimant placed before this Court a letter dated May 16, 2017, in which letter the

Respondent computed his entitlement in terms of house allowance for the period 2013-2016, four years, and urged him to acknowledge receipt.

51. The Court gets an impression that house allowance for the period was paid. The Claimant didn't assert that he was not paid the sum of KSHS. 31,304. The four years for which I would have awarded house allowance for, were well taken care of, consequently, I decline to make any award under this head.

52. I have carefully scrutinized the pay slips that were presented by the Claimant as evidence in this matter. I note that the pay slip dated 13th December 2009, has an item for overtime pay. The pay slip is one of the oldest presented by the Claimant. The pay slip leaves me with no doubt that whenever, the Claimant worked overtime, he was remunerated. There are numerous other pay slips exhibited by the Claimant which has the overtime pay. The claim in regard to unpaid overtime worked is declined.

e) General damages.

I. Breach of contract.

53. The Claimant stated that he was employed by the Respondent vide an oral agreement. The terms and conditions of the contract that were allegedly breached were not at all articulated before this court to enable it make a just determination on this relief sought. With great respect, all that the Claimant did was to just throw the relief to the court and hope that miraculously, the Court will grant the same. The relief is one for rejection, consequently.

II. Loss of income.

54. There is no basis for awarding this prayer as the Claimant did not lead any evidence to prove his entitlement to the same.

III. Damages for the illegal termination.

55. The Claimant was summarily dismissed without being given month notice in the mandatory provision of section 44[2] of *Employment Act*. In view of the above the claimant is awarded Ksh.15,652 as salary in lieu of notice, pursuant to the provisions of section 36 of the Act.

56. The Claimant further sought damages for the unfair termination. The authority to grant this award flows from section 49 of the Act and the same is exercised depending on the circumstances of each case. Taking into the length of Claimant's engagement with the Respondent, the manner in which he was dismissed, and the fact that the dismissal appears retaliatory I find that the Claimant is entitled to the compensatory relief contemplated under the section, and to an extent of 8 months' gross salary, Ksh.125,216.

57. In upshot, judgment is hereby entered for the Claimant against the Respondent in the following terms:

    a) A declaration that the dismissal of the Claimant from employment was both procedurally and substantively unfair.

    b) Salary in lieu of notice..... Ksh.15,652.

    c) Compensation pursuant to the provisions of Section 49[1][c] of the *Employment Act*..... Ksh.125,216.

    d) Interest at court rates from the date of this judgement till full payment.

    e) Costs of the suit.

Read, Signed and Delivered Virtually at Nairobi this 27th Day of April, 2023.

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Ocharo Kebira

Judge

In the presence of

Mr. Ocharo for the Claimant.

Mr. Onyango for the Respondent.

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 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 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.

A signed copy will be availed to each party upon payment of court fees.

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Ocharo Kebira

Judge