



**Nyanjong v Pesa Transact Limited (Cause 1493 of 2016)
[2023] KEELRC 1034 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1034 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1493 OF 2016**

JK GAKERI, J

APRIL 27, 2023

BETWEEN

GEDION AGUMBA NYANJONG CLAIMANT

AND

PESA TRANSACT LIMITED RESPONDENT

JUDGMENT

1. The Claimant initiated this suit by a Memorandum of Claim filed on 29th July, 2016. The Claimant avers that he was employed by the Respondent as a Junior Clerk in August 2011 at Kshs 19,215/= and worked diligently and faithfully until 9th February, 2015 when his services were terminated.
2. That on 29th January, 2015, he received a letter of transfer to Kisumu from 9th February, 2015 allegedly because he was inciting fellow employees to join the Kenya Bankers Union.
3. That he reported on 9th February, 2015 and was asked to write an apology for inciting workers to join the union and was informed that his employment had been terminated.
4. The Claimant avers that the procedure for termination of employment was not complied with.
5. That he was not paid housing allowance and terminal benefits.
6. The Claimant prays for;
 - i. A declaration that the termination was unlawful.
 - ii. One month's salary in lieu of notice Kshs 19,215/=.
 - iii. House allowance at 15% x 42 months Kshs 121,054.50
 - iv. Office Welfare Fund contribution Kshs 21,500/=.



- v. 12 months compensation Kshs 230,580.00.
- vi. Unpaid leave days for 2014 Kshs 19,215.00.
- vii. Issue of P9A form for tax returns.
- viii. Costs of the suit.
- ix. Interest on (ii), (iii), (iv), (v) and (vi) at court rates.
- x. Such further or other relief that the court may deem fit to grant.

Respondent's Case

7. In its Memorandum of Response filed on 28th November, 2016, the Respondent avers that the Claimant was a Junior Clerk at the Respondent's Nakumatt Nairobi Branch until he abandoned his post without notice or lawful cause as evidenced by letter dated 23rd March, 2015, and admitted having incited fellow workers as minutes of the disciplinary hearing on 9th February, 2015 which the Claimant signed attest.
8. It denies having terminated the Claimant's employment unlawfully.
9. It is the Respondent's case that he abandoned his post in February 2015 and refused to collect his dues of Kshs 26,313/= i.e salary for the days worked in February 2015 and refund of contributions to the Office Welfare Fund.
10. That his salary was consolidated and thus inclusive of house allowance and all statutory deductions were remitted.
11. It is the Respondent's case that the Claimant had no leave days pending at the time he deserted.
12. The Respondent prays for dismissal of the suit with costs.

Claimant's Evidence

13. The Claimant's written statement dated 16th June, 2016 replicates the contents of the Memorandum of Claim but for the reliefs.
14. On cross-examination, the witness confirmed that there was no letter from the Respondent for him to report to the workplace and had two previous warning letters.
15. He testified that he reported to Kisumu and was taken through a disciplinary process and did not receive a termination letter and had been awaiting a response from the Respondent.

Respondent's Evidence

16. RWI, Mr. Peter Otieno testified that the Claimant was employed under a written contract of service, was transferred to Kisumu in early 2015 and was facilitated to move to Kisumu.
17. That he reported to work, was given a break but did not return and did not respond to the letter by the witness.
18. That his salary was consolidated and was a member of the NSSF.
19. The witness confirmed that he is the one who transferred the Claimant to Kisumu.



20. It is the Respondent's case that the Claimant was later invited for a disciplinary hearing but did not appear and his employment was terminated for desertion of duty and the letter was dispatched via a supervisor.

Claimant's Submissions

21. According to the Claimant's counsel, the issues for determination are;
- i. Whether termination of the Claimant's employment was unlawful and unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
22. On termination, counsel submitted that the Respondent acted on mere suspicion as it adduced no evidence that the Claimant violated the provisions of Section 44(4) of the *Employment Act*, 2007.
23. Reliance was made on the provisions of Sections 41, 43 and 45 of the *Employment Act*, 2007 to urge that termination of the Claimant's employment was unfair.
24. The decision in *Anthony Mkala Chitavi V Malindi Water & Sewerage Co. Ltd* was cited to buttress the submission on procedural propriety in termination of employment, as were the sentiments of the Court of Appeal in *Julia Cooper Rust V Academy Dance & Art* (2019) eKLR and *Jared Aimba V Fina Bank Ltd* (2016) eKLR among other decisions to urge that the Respondent did not comply with the provisions of Section 41 of the *Employment Act*.
25. Finally, the decisions in *Gilbert Mariera Makori V Equity Bank Ltd* (2016) eKLR and *Mary Kiptui Chemweno V Kenya Pipeline Co. Ltd* (2014) eKLR were also relied upon to underscore the essence of procedural propriety.
26. The provisions of Section 45(2) of the *Employment Act* were cited to urge that the Respondent did not provide the reasons for termination of the Claimant's employment.
27. As regards the reliefs sought, counsel urged that the Claimant was entitled to all the reliefs claimed on account of unlawful termination of employment.

Respondent's Submissions

28. The Respondent's counsel identified two issues for determination, namely;
- i. Whether termination of the Claimant's employment was fair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
29. As regards termination, counsel relied on the provisions of Section 43(2) of the *Employment Act* and the test formulated in *British Leyland UK Ltd V Swift* (1981) IRLR 91.
30. As was the decision in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR to urge that the Respondent had a valid and fair reason to terminate the Claimant's employment.
31. Section 44(4)(a) of the *Employment Act* was also relied upon.
32. The court was urged to find that the reason for termination was valid and fair as the Claimant absconded duty.



33. As regards procedural fairness, counsel relied on the provisions of Section 41 of the *Employment Act* and the decision in *Anthony Mkala Chitavi V Malindi Water & Sewerage Co. Ltd (Supra)* to underline the centrality of procedural fairness in termination of employment.
34. Counsel submitted that a notice to show cause was issued on 23rd March, 2015 but the Claimant did not respond, which led to summary dismissal.
35. As regards the reliefs sought, counsel urged that since termination of the Claimant's employment was fair, he was not entitled to the reliefs sought.
36. That the Claimant had been reluctant to collect the sum of Kshs 26,313/= as his dues and Form P9.
37. Counsel submitted that consolidated salary as was the Claimant's was housing allowance inclusive (See *Jubilee Jumbo Hardware Ltd V Rogaciana Rading Ogwag* (2021) eKLR.
38. That the Claimant had no leave days and was in employment until March, 2015.

Determination

39. The issues for determination re;
 - i. Whether termination of the Claimant's employment was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
40. As regards termination of employment, counsels adopted opposing position. While the Claimant's counsel submitted that it was substantively and procedurally unfair, counsel for the Respondent submitted that it was fair in both respects.
41. Needless to belabour, the provisions of the *Employment Act*, 2007 are unambiguous that for a termination of employment to pass the fairness test, it must be substantively justifiable and procedurally fair.
42. The provisions of Section 43, 45(2) and 47(5) of the *Act* set out elaborate provisions on the requirement for reason(s) for termination which must be valid and fair and in relation to the matters set forth in Section 45(2)(b)(i) and (ii) of the *Act* while Section 47(5) addresses justification.
43. The provisions of Section 45(2) and 41 of the *Employment Act* address procedural fairness.
44. Section 41 of the *Act* prescribe the procedural elements which characterise a fair termination of employment.
45. The essence of these provisions was adverted to by the Court of Appeal in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR.
46. The twin requirement was also underscored by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR as follows;

“ . . . For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness . . .
47. Similar sentiments were expressed in the Court of Appeal in *Naima Khamis V Oxford University Press (E.A) Ltd* (2017) eKLR.



48. The specific elements of procedural fairness have been emphasized in innumerable decisions of this court and the Court of Appeal, among which is the Court of Appeal decision in *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR.

Reason for Termination

49. In the instant case, it is not in dispute that the Claimant was an employee of the Respondent and was transferred from Nairobi to the Kisumu Branch via letter dated 29th January, 2015 and was required to report there on 9th February, 2015 and the Claimant appealed against the transfer by letter dated 31st January, 2015 which the Respondent declined by letter dated 3rd February, 2015 and on the same day invited the Claimant for a disciplinary hearing in Kisumu. The letter did not disclose the charges the Claimant was facing but records reveal that the Respondent had received a complaint from one Reagan Omondi that the Claimant was sending messages to staff which were inciteful.
50. The Claimant attended the meeting and admitted having sent the message and was apologetic about it.
51. The Claimant's allegation that his employment was terminated on 9th February, 2015 is not supported by any evidence.
52. He did not indicate who communicated the information, where and when and what he did now that he was aware that he no longer had a job.
53. However, the letter alleging to have suspended the Claimant without pay upto 24th February, 2015 has no acknowledgement by the Claimant.
54. More significantly, subsequent communication would appear to show that the employment relationship between the parties continued after 9th February, 2015.
55. The Respondent's letter dated 4th March, 2015 and subsequent communication leave no doubt that the Claimant was still in employment of the Respondent and was expected to report on 10th March, 2015 and would be paid Kshs 12,000/=, the standard transfer rate from Nairobi.
56. The Claimant confirmed the fact of being in employment on the same day by an email to one Lyvian at 6.40 am on 7th March, 2015 when he acknowledged receipt of the letter on reporting at work on 10th March, 2015 but indicates that he had no money to relocate to Kisumu and needed Kshs 30,000/= to do so as he had only earned Kshs 5,900/= in February 2015, perhaps due to the suspension from 9th to 25th February, 2015.
57. By a subsequent email dated 9th March, 2015, Lyvian confirmed to Frederik, Paul Otieno and another that she had spoken to the Claimant and agreed on the payment of Kshs 12,000/= on the same day and would report to the workplace on 12th March, 2015 when they would discuss how other items would be transported.
58. Evidently, the Claimant reported to work on 12th March, 2015 but before he was introduced to his new work mates, he sought permission to go for breakfast and did not return and a show cause letter was issued dated 23rd March, 2015 which invited the Claimant to a disciplinary hearing on 31st March, 2015 at 9.00 am but he did not attend and was thereafter dismissed via letter dated 2nd April, 2015.
59. The reason for termination of employment was failure to report to work without permission or lawful cause as provided by Section 44(4)(a) of the *Employment Act*, 2007.
60. Regrettably, the Respondent did not provide evidence to show that it dispatched the Notice to Show Cause and the summary dismissal letter to the Claimant who denied having received the letter.



61. None of the letters has an acknowledgement signature nor copy of the email that forwarded the same.
62. Did the Claimant desert the workplace?
63. According to the *Black's Law Dictionary*, 10th Edition, desertion is;

“The wilful and unjustified abandonment of a person’s duties or obligations.”
64. See also *Seabolo V Belgravia Hotel* (1997) 6 BLLR 829 (CCMA) where a Southern African Court explained the concept of desertion as distinguishable from absence without leave.
65. In the words of Ndolo J. in *Ronald Nyambu Daudi V Tornado Carriers Ltd* (2019) eKLR,

“Desertion of duty is a grave administrative offence which if proved would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration.”
66. The court expressed similar sentiments in *Felistas Acheba Ikatwa V Charles Peter Otieno* (2018) eKLR.
67. Relatedly, even where the employee absconds or deserts, he or she is by law entitled to a fair disciplinary process as prescribed by law as was held in *Judith Atieno Awuor V Sameer Agriculture & Livestock Ltd* (2020).
68. In the instant case, it is not in contest that after the Claimant was transferred to Kisumu, he was due to report on 25th March, 2015, after the suspension imposed on 9th February, 2015 but did not and the Respondent reached out to him by letter dated 4th March, 2015 and was to report on 10th March, 2015 but did not and reported on 12th March, 2015 but disappeared never to be seen again precipitating the notice to show cause dated 23rd March, 2015.
69. In light of the foregoing, it is the finding of the court that the Respondent has on a balance of probabilities proved that the Claimant absconded duty. He demonstrated no intention to take up the position in Kisumu despite the Respondent reaching out to him consistently.
70. Section 44(4)(a) of the *Employment Act* recognizes desertion as a form of gross misconduct which entitles the employer to summarily dismiss an employee if “without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work.”
71. In sum, the Respondent has demonstrated that it had a valid and fair reason to terminate the Claimant’s employment.

Procedure

72. While the Claimant urges that the provisions of Section 41 of the *Employment Act* were not complied with in totality, the Respondent’s counsel submitted that the procedure employed by the Respondent was consistent with the law.
73. In *Postal Corporation of Kenya V Andrew K. Tanui* (*Supra*), the Court of Appeal itemised the essentials of procedural fairness as follows;

“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 are made;
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

74. Applying the foregoing principles to the facts of the instant case, the court is satisfied that the provisions of Section 41 of the *Employment Act*, 2007 were not complied with as by law required in that the Respondent tendered no evidence to prove that notice to show cause dated 23rd March, 2015 was in fact forwarded and received by the Claimant.
75. The Respondent availed neither an acknowledgement of the letter nor the forwarding email, call log nor message.
76. It is thus unclear as to whether the Claimant was aware that termination of employment was being considered.
77. Secondly, although RWI testified that the disciplinary hearing could not proceed due to the Claimant’s non-attendance, he adduced no evidence as to who the members of the disciplinary committee were or minutes of the proceedings to demonstrate what the committee recommended after realising that the Claimant would not attend.
78. Minutes of the meeting would have shown when the meeting commenced and at what point the disciplinary committee gave up and recommended the way forward, including whether attempts were made to reach out to the Claimant that morning. This is more so because the Claimant had not responded to the notice to show cause by 27th March, 2015 when the Respondent anticipated a response.
79. It is incumbent upon the Respondent to prove that indeed there was a meeting on that day and that the Claimant did not attend.
80. In the absence of evidence that the notice of the disciplinary hearing was in fact communicated to the Claimant, it is difficult to find that the Claimant was accorded the right to be heard before termination of his employment.
81. Finally, the Claimant testified that he did not receive a termination letter and regarded himself an employee of the Respondent, evidence the Respondent did not controvert.
82. From the foregoing, it is the finding of the court that the provisions of Section 41 of the *Employment Act* were not complied with and termination of the Claimant’s employment, though substantively justifiable on account of absconding duty was procedurally unfair.



Reliefs

a. Having found that termination of the Claimant's employment was unfair for want of procedural propriety, a declaration to that effect is warranted.

b. One month's salary in lieu of notice

83. Having found that the Claimant indeed deserted the workplace, the claim for one (1) month salary in lieu of notice is unsustainable. Relatedly the Claimant testified that he did not receive a notice of termination.

The claim is declined.

c. House allowance for 42 months Kshs 121,054.50

84. Paragraph 4 of the Claimant's Letter of Appointment dated 6th August, 2011 expressly stated that his monthly salary of Kshs 14,500/= was consolidated.

85. Clause 61 of the Claimant's Letter of Appointment dated 7th March, 2014, a copy of which was availed by the Claimant stated as follows;

“Your consolidated monthly salary will be Kshs 18,300/= . . .

86. Similarly, the letter of extension of contract dated 27th December, 2014 stated clearly that;

“Your consolidated monthly salary will increase to Kshs 19,215/=.”

87. Equally, neither the written statement nor the oral evidence adduced in court addressed the issue of unpaid house allowance.

88. Payment of a consolidated salary by the Respondent is consistent with the provisions of Section 31(2) (b) of the *Employment Act*, 2007.

89. As a consequence of the foregoing, the claim for housing allowance is unsustainable and is declined.

d. Contributions to the Office Welfare Fund Kshs 21,500/=

90. This claim is uncontested by the Respondent and documents availed by the Respondent reveal that the sum of Kshs 21,000/= was owing.

The claim is allowed.

e. Underpaid leave days

91. Neither the Claimant's written statement nor the oral evidence adduced in court made reference to underpaid leave days, how many they were or when the inaccurate or erroneous payment was made.

In the absences of particulars, the claim is declined.

f. 12 month's salary compensation

92. Having found that termination of the Claimant's employment was unfair for want of procedural fairness, the Claimant is entitled to the relief provided by Section 49(1)(c) of the *Employment Act*.

93. In determining the quantum of compensation, the court has taken the following into consideration;



- i. The Claimant was an employee of the Respondent for a period of about 3 years, 7 months.
- ii. The Claimant acknowledged on cross-examination that he had two (2) previous warnings and had been forgiven by the employer. The first warning dated 16th May, 2012 related to small deficits in places the Claimant had worked and the second dated 9th August, 2014 related to failure to complete the reconciliation form on several occasions. The warnings resulted to a disciplinary hearing and the Claimant was given a final warning.
- iii. The Claimant demonstrated no intention that he wished to continue in the employment of the Respondent.
- iv. The Claimant substantially contributed to termination of his employment.

94. In the circumstances, the court is satisfied that the equivalent of 2 months salary is fair.

g. Issue of P9A for purposes of Tax return

95. The employer is bound to facilitate the employee in the filing of tax returns by availment of the necessary documentation and Form P9A is one of the documents.

The same should be availed within 30 days of this judgement.

96. In conclusion, judgement is entered for Claimant against the Respondent in the following terms;

- a. Declaration that termination of the Claimant's employment by the Respondent was unfair.
- b. Refund of the Claimant's contribution to the Office Welfare Fund.
- c. Equivalent of 2 month's salary.
- d. Form P9A to issue to the Claimant within 30 days.
- e. Costs of this suit.
- f. Interest at court rates from the date hereof till payment in full.

97 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF APRIL 2023

DR. JACOB GAKERI

JUDGE

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 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.

