



**Wanda v Marura Nursing Home Ltd (Cause 1466 of 2017)  
[2023] KEELRC 1233 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1233 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1466 OF 2017**

**K OCHARO, J  
APRIL 27, 2023**

**BETWEEN**

**LINET ATIENO WANDA ..... CLAIMANT**

**AND**

**MARURA NURSING HOME LTD ..... RESPONDENT**

**JUDGMENT**

1. At all material times the Claimant was an employee of the Respondent up to until the 5<sup>th</sup> May 2017 when the Respondent summarily dismissed her from employment. Charging that the dismissal was unlawful, she commenced this suit by a Memorandum of Claim dated 25<sup>th</sup> July 2017 seeks the following prayers against the Respondent;
  - a. A declaration that the termination was unlawful, untimely;
  - b. An order that the Respondent pay the Claimant her dues and benefits of Kshs 174, 915.39
  - c. An order that the Respondent do issue the Claimant with a certificate of service.
  - d. Cost of the claim and interest.
2. Upon being served with summons to enter appearance, the Respondent entered appearance and subsequently filed a memorandum of reply dated 21<sup>st</sup> September 2017. In the reply, it denied the Claimant's cause of action and entitlement to the reliefs sought.

**The Claimant's Case**

3. At the hearing, the Claimant urged the Court to adopt her witness statement filed herein as her evidence in chief, and the documents that were filed contemporaneously therewith as her documentary evidence. It was her case that she first came into the employment of the Respondent on the 10<sup>th</sup> February 2016, as a house keeper, at a salary of Kshs. 10,000 per a month.



4. The Claimant stated that on the 11th February 2017, she had travelled home to attend a burial ceremony of a relative. As she was travelling back, the vehicle in which she was travelling developed a mechanical problem. She consequently, couldn't make it to her place of work. She got constrained to call and inform the Head of Human Resource department who gave her authority to report to work the following day, the 12<sup>th</sup> February 2017. Indeed, she reported at around 11 a.m.
5. On the same day, she was handed a suspension letter, accusing her of desertion of duties. She was placed on suspension for 14 days. She resumed duty on the 27<sup>th</sup> February 2017. She was not paid salary for the 14 days.
6. The Claimant testified that on the 5<sup>th</sup> May 2017 she was summarily dismissed from employment vide a letter of the even date. When she inquired as to why she had left water running on the second floor of the hospital. She contended that at the alleged time of the incident, she was not working on the floor but the ground floor where she had been assigned duties. Further, she was directed to pay Kshs. 2000, which sum she refused to pay.
7. The Claimant asserted that the Respondent neither conducted any investigations into the incident nor gave her a chance to be heard on the accusations, before she was dismissed. The dismissal was wanting in procedural fairness and substantive justification.
8. The Claimant seeks the following the following dues;
  - a. Service pay Kshs 6,319.62
  - b. Under Payment 954 x12 Kshs 11,448.00
  - c. Compensation for loss of earnings Kshs 131, 448.00
  - d. Salary in lieu of notice Kshs 10,954.00
  - e. Salary for 14 days in the month of February Kshs 5,898.31
  - f. Leave days accrued for 1-year Kshs 8,847.46
9. The Claimant alleged that throughout he employment with the Respondent, the latter paid her monthly salary that was below the statutory minimum salary as was prescribed in Legal Notice 116 of 2015, Kshs 10,954 for her level of employment.
10. In her evidence under cross examination, the Claimant stated that though she was employed as a cleaner to undertake general cleaning duties, sometimes the Head of Human Resource Department would allocate her other duties like working in the kitchen.
11. She further testified that she was surprised when the one Human Resource Manager gave a suspension letter, yet she is the one who, she called when she got a challenge of getting back to work, permitted her to report back on the 12<sup>th</sup> February 2017.
12. The Claimant denied the suggestion by Counsel for the Respondent that she neglected her duties reason why she was summarily dismissed.
13. In her evidence under re-examination, the Claimant testified that the suspension letter acknowledged that on the 11<sup>th</sup> February 2017, when she was getting back to work, she had the challenge hereinabove stated.



## Respondent's evidence

14. The Respondent's case was presented one Isaac Waishigo Ndungu, its Administrator. The witness adopted his witness statement filed herein as his evidence in chief and urged the Court to admit the documents that the Respondent filed in this matter as its documentary evidence.
15. The witness testified that the Claimant was by the Respondent under a letter of employment dated 9<sup>th</sup> February 2016. Her salary was set under the contract of employment as Kshs. 10,000. She executed the contract without raising any issue concerning its sufficiency.
16. The witness further testified that on or about the 11<sup>th</sup> February 2017, the Claimant was off duty with the permission of the Human Resource Manager. However, without permission, she didn't report back on the 11<sup>th</sup> February 2017, as she was expected to. She failed to so report back alleging that she had transportation challenge getting to work. She ought to have arranged with somebody to hold her forte, but she didn't, thereby inconveniencing the Respondent. This earned her a suspension period of 14 days.
17. The witness asserted that the Claimant's performance in her duty of general cleaning was below the Respondent's standards. Despite several warnings, she never improved. The Respondent dismissed her on the 5<sup>th</sup> May 2017.
18. In his evidence under cross examination, the witness stated that The Claimant had been given more than five verbal warnings before the dismissal, within a period of three months. The suspension letter served as one of those warnings against her on the manner she was discharging her services.
19. He further testified that the Claimant would at times be allocated duties outside the space of general cleaning. For instance, sometimes, she would be assigned to work in the kitchen. As regards her performance being below standard, he got information from the Heads of Departments.

## Claimant's Submissions

20. The Claimant identifies two issues for determination:
  - a. Whether the claimant's termination from employment was unlawful and unfair.
  - b. Whether the claimant is entitled to her terminal dues.
21. On the first issue the Claimant submitted that there was no cause or trite reason given by the Respondent as to the termination and the claimant was not given an opportunity to defend herself.
22. The Claimant submitted that the termination was contrary to Section 45(1) and (2) of the *employment Act*.
23. The Claimant also relied in the holding in *Walter Ogal Anuro v Teachers Service Commission (2013)*

“For termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addressed the procedure adopted by the employer in effecting the termination”
24. The Claimant submitted that her termination lacked both substantive justification and procedural fairness.



25. On the second issue the claimant submitted that the legal Notice No. 116 of 2015 provided for minimum monthly wage of Kshs 10,954, for housekeepers, yet she earned a monthly salary of Kshs 10,000.
26. It was further submitted that she was deprived of her salary for the period she was on suspension. The deprivation was without any justification or legal foundation. She is entitled was entitled to payment for the duration. To buttress this point, she relied on the holding in Thomas Sila Nziro vs Bamburi Cement Limited 2014 where the court held that;
- “No provision under the law allows an employer to deny an employee on suspension his monthly salary. The suspension without pay offended the principles of fair labour practices and protection of wages”
27. The claimant summed up her submissions thus, having established that she was unfairly dismissed she is entitled to the terminal dues as sought in the memorandum of claim.

### **Respondent’s submissions**

28. The Respondent submitted that the Claimant’s dismissal from employment was attracted her conduct. She had been warned severally but nonetheless failed to improve. Through the material placed before the Court, the Respondent discharged the burden placed on it by the provisions of Section 43,45 and 49(5) of the [Employment Act](#).
29. The Respondent relies in the holding in Benjamin Chepkairon v Kenya Urban Roads Authority (2016) eKLR
30. The respondent submits that the claimant was negligent in performance of her duties hence the reason for termination

### **Determination**

31. After careful consideration of the pleadings, evidence on record and submissions by counsel, the issues for determination are;
- i. Whether the termination of the claimant’s employment was unfair.
  - ii. Whether the Claimant is entitled to the prayers sought.

### **Whether the termination of the claimant’s employment was unfair.**

32. There is no contest that the Claimant was employed by the Respondent on the 10<sup>th</sup> of February 2016 as a housekeeper for the position of a housekeeper with a salary of Ksh 10,000 per month. Her contract of employment was under a letter of employment dated 9<sup>th</sup> February 2016. According to the letter, her contract was in nature a term contract of three [3] years renewable by mutual consent however subject to her satisfactory performance.
33. There is no contest too that the Respondent by a letter dated 5<sup>th</sup> May 2017, brought to an end the Claimant’s employment. The letter that was captioned “Termination Letter” read in part;
- “Reference is hereby made to your conduct observed in the last several days during which your cleaning has failed to meet the required standards. It is unfortunate that you have failed



to treat your work with the importance it needs even after having faced suspension less than two months ago. This gives us no choice other than to take the necessary action.

This letter therefore serves as your immediate termination notice. Kindly clear your dues with the accounts office.”

34. Section 44 of the *Employment Act*, 2007 stipulates when summary dismissal can occur, thus:

“Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled to by a statutory provision or contract term.

(2) .....

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employer has by his conduct indicated that he has fundamentally breached his obligation arising under the contract of service.”

35. Though the Respondent does not state it, a reading of the provisions forestated reveals that what happened here was a summary dismissal, and it is through these lens that this Court shall interrogate the fairness or otherwise of the determination of the Claimant’s contract of employment.

36. Further, whether or not there was a conduct by the Claimant that fundamentally breached her obligations arising under the contract, I shall delve into, shortly.

37. Section 43 of the *Employment Act* places an obligation upon the employer 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.

38. Section 44, provides for actions and inactions of an employee that may amount to gross misconduct so as to justify a summary dismissal of an employee. However, it is imperative to state that the list is not an exhaustive one. An employer can dismiss an employee summarily on a ground outside the catalogue for as long as the same has the characteristic such as I will demonstrate shortly, hereinafter.

39. It is not enough for an employer to cite that an employee committed one or more of those actions or omissions obtaining in the list provided for in section 44[4] of the *Employment Act*, 2007. An employee’s misconduct does not inherently justify a summary dismissal unless it is “so grave” that it intimates the employee’s abandonment of the intention to remain in employment. In *Laws v- London Chronicle Limited* [1959] 2 ALL L.R 285 the English Court of Appeal stated;

“Since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justified, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.”

40. Worth stating that in this matter, the only evidence from which the conduct that is alleged to have attracted the sanction against the Claimant can be discerned is the Respondent’s letter dated 5<sup>th</sup> May 2017. I have carefully considered the contents of the letter and conclude that it is framed in too general a manner, that one is unable to gather the exact reason why the Claimant was summarily dismissed and or whether the accusation against her was of the gravity to be said to have violated the “essential conditions” of her employment contract. The Court has not lost sight of the fact that the letter mentions of the Respondent’s standards. Which standards? How measured? from where can they be deduced? are matters that were essential to be availed by the Respondent but that were not.



41. Considering the foregoing premises, I come to an inescapable conclusion that the Respondent failed to prove that the reasons[s] for the summary dismissal was valid and fair. It failed to discharge its burden under the provisions of section 45 of the Act.
42. Section 41 of the Employment Act provides for the procedure that an employer contemplating terminating an employee's employment or summarily dismissing an employee must follow. There is now firm jurisprudence that the procedure is mandatory. Any default in adhering to the procedure shall no doubt render the termination or dismissal unfair. Procedural fairness encompasses three components, first, notification, the employer contemplating the dismissal or termination must inform the employee of the intention and the grounds prompting the same, second, the hearing, the employee must be accorded a sufficient opportunity to make a representation on the grounds, and third, the consideration component, the employer shall consider the representation[s] made by the employee before making the decision.
43. Section 45 (1) and (2) of the Employment states
- (1) No Employer shall terminate the Employment of an Employee unfairly
  - (2) A termination of employment by the employer is unfair if the employer fails to prove; -
    - (a) that the reason for termination is valid
    - (b) that the reason for termination is a fair reason
      - (i) related to the employees conduct, capacity or compatibility; or
      - (ii) based on the operational requirement of the employer; and
    - (c) that the employment was terminated in accordance with fair procedure”
44. On fairness test in termination of employment by an employer, the Court aptly captured it in *Walter Ogal Anuro v Teachers Service Commission (2013)* that,
- “For termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addressed the procedure adopted by the employer in effecting the termination”
45. No doubt in my mind, the Respondent did not place forth any evidence to demonstrate that it did adhere to the procedure set out in section 41 of the Act. Consequently, I am persuaded by the Claimant's that her dismissal was afflicted by procedural fairness absence.
46. By reason of the foregoing premises, I conclude that the dismissal was both procedurally and substantively unfair.

**On the reliefs sought.**

47. The claimant seeks payment of the salary 14 days she was put on suspension in the month of February 2017.
48. The Claimant was suspended for 14 days vide the letter dated 12<sup>th</sup> February 2017 for failure to report to work on the 11<sup>th</sup> February 2017. The letter states in part

“This letter therefore serves as your suspension Notice without Pay effective today...”



49. In the case of Peterson Ndung'u & 5 others v Kenya Power and Lighting Company Limited [2014] eKLR the court held:
- “Section 18 (4) of the [Employment Act](#) demands that even in cases of summary dismissal, the Employee shall be paid all monies, allowances and benefits due to him up to the date of his dismissal. There is no longer any legal support for Employers to deduct from the Employees' wages, or withhold the Employees' wages, as a disciplinary imposition”
50. The Respondent did not place before court any justification for its action. I am persuaded by the decision above stated that in our current legal regime there cannot be any legal justification for an employer to deduct an employee's salary as a punitive measure. I find for the Claimant, she is entitled to the 14 days salary withheld at the time of suspension.
51. The Claimant pleaded under payment for the duration she worked for the Respondent. Legal Notice 117 of 2015 provides for a basic salary of Kshs 10, 954.79 for the position of General labourer including cleaner, sweeper, gardener, children's ayah, house servant, day watchman, in which category the claimant falls.
52. There was no dispute that under the contract of employment, the Claimant was earning a monthly salary of Kshs 10,000. The amount in my view was less than the minimum that was provided by the Wage Order of the material time. The Respondent argued that the salary was a contractual salary, and therefore the Claimant cannot be heard to raise the issue of underpayment. With great respect, this argument is in ignorance deliberate or otherwise of the provisions of Section 48 of the [Labour Institutions Act](#). The provision forbids any out contracting of wage terms and conditions of work provided for in Wage Orders, for lesser wages or unfavourable conditions by employers. which is less than the Basic Monthly Wages.
53. The stated provision of the law provides employees with a right to pursue payment of any money as a result of underpayment of the wages stipulated in wage orders. As such the Claimant is entitled to the amount sought as underpaid salary for the duration she worked for the Respondent.
54. The Claimant claimed for one month's salary in lieu of notice. As per the contract of employment, her employment was terminatable by one month's notice or payment of one month's salary in lieu thereof. The notice was neither issued nor the payment in lieu made. I find no difficulty in awarding her one month's salary in lieu of notice, as per the minimum wage stipulated in Legal Notice 117 of 2015 being Kshs 10,954
55. The Claimant further contended that during the entire period of her employment with the Respondent, she did not take leave. The Respondent did not rebut the allegations. Annual leave is a statutory. I award 1month leave being Kshs 10,940
56. The claimant has sought for Compensation for unfair dismissal to an extent of twelve months' gross salary. Under the provisions of section 49[1][b], the relief as sought by the Claimant is one of those contemplated thereunder. However, it is worth stating that an award of the relief is discretionary, dependent on the circumstances of each case. This court has carefully considered the manner in which the Claimant was dismissed from employment, which in my view easily passes for an unfair practice on the part of the Respondent, the fact that Respondent deviated from what the law required of it unjustifiably, fairness and conclude that she is entitled to the award and to an extent of 7 months gross salary, Kshs. 76,683.53.
57. In the upshot, judgment is hereby entered for the Claimant in the following terms;



- a. That the termination of his employment was both procedurally and substantively unfair.
- b. . Salary for the 12 days when she was on suspension, Kshs. 4, 381.90.
- c. One month's salary in lieu of notices, Kshs. 10,954. 79
- d. Salary Under Payment (954 x 12months) Kshs 11,448.00
- e. Compensation for untaken leave days, Kshs. 8,847.46.
- f. Compensation pursuant to the provisions of section 49 [1][b], 7 months' gross salary, Kshs. 76,683.53.
- g. Costs of this suit.
- h. Interest at court rates on the sums awarded from the date of this judgment till full payment.

**READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27<sup>TH</sup> DAY OF APRIL 2023**

**OCHARO KEBIRA**

**JUDGE.**

In the presence of:

Ms Cherop holding brief for Ms Mideva

For the Claimant

N/A 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

