



**Kimanzi v United Paints Limited (Cause 990 of 2018)
[2023] KEELRC 871 (KLR) (14 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 871 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 990 OF 2018**

**SC RUTTO, J
APRIL 14, 2023**

BETWEEN

JOSEPH KITONGA KIMANZI CLAIMANT

AND

UNITED PAINTS LIMITED RESPONDENT

JUDGMENT

1. It is not in dispute that at the material time, the parties were in an employment relationship. What is in dispute is the circumstances and the manner in which the said employment relationship ended. As it came to be, the claimant's employment came to an end following the events that transpired on February 13, 2018, while he was on his way to deliver items to the respondent's customers. The claimant avers that on the said date, he was insulted verbally and assaulted physically by the respondent's driver, by the name Mr Wilson Thuku, who was driving the dispatch vehicle. The claimant further avers that the respondent had no substantive reason to terminate his employment and in so doing, did not follow the prescribed process. It is on account of the foregoing that the claimant seeks against the respondent, several reliefs including the sum of Kshs 750,432.88 being accrued leave, compensatory damages, unpaid house allowance and salary underpayment.
2. The claim did not go unopposed as the respondent avers through its statement of response that the claimant was terminated on grounds of gross misconduct for physically assaulting a co-worker and following an altercation with the respondent's driver Mr Wilson Thuku. That the claimant's termination was lawful and in tandem with the laid procedure under the Employment Act, 2007. Consequently, the respondent has asked the court to dismiss the claim with costs.
3. The claimant in his reply to the statement of response, denied the respondent's assertions and reiterated the averments in his memorandum of claim.
4. During the hearing which proceeded on November 2, 2022, each side called oral evidence.



Claimant's Case

5. The claimant testified in support of his case and to start with, he adopted his memorandum of claim, verifying affidavit, witness statement and bundle of documents to constitute his evidence in chief.
6. It was the claimant's evidence that he was engaged as an Admin in the dispatch, transport and logistics unit from March, 2009 until 2016 when he was moved to the delivery unit. That he was not issued with a contract of employment. That he was a diligent and faithful employee without any disciplinary or performance issues.
7. Recounting the events that culminated in the termination of his employment, the claimant testified that on February 13, 2018, during the course of his duties, he had an altercation with one of the respondent's drivers by the name Mr Wilson Thuku who he alleges, was drunk while at work. That the said driver who was driving one of the dispatch vehicles he was using to deliver items to the respondent's customers, insulted him verbally and assaulted him physically thereby breaking his spectacles and in the process, injured him on the face.
8. That on February 28, 2018, he received a letter from the respondent terminating his employment allegedly on grounds of physical confrontation with Mr Thuku, the driver. That no action was taken against the driver hence amounting to discrimination against him in contravention of section 5 of the *Employment Act*. That it is a curious fact that the respondent's management who were not present in the vehicle when the altercation took place believed the driver's story while there was evidence that his spectacles were broken.
9. That the respondent pushed the driver to make a false report to the police after receipt of the demand letter so as to create a narrative of a serious offence on his part while they knew very well and witnessed the said driver report to work drunk and was allowed to operate the company vehicles while in that state as was the case on the material day.
10. That the respondent did not follow the prescribed process of termination in the *Employment Act*. That following the altercation with the driver, they were called to explain what had transpired and were informed that the matter had ended there. That he did not receive any show cause letter nor was he invited for a disciplinary hearing or given a chance to defend himself prior to being issued with the termination letter.
11. It was the claimant's further evidence that he never proceeded on annual leave for the entire duration of his tenure and that he was not paid house allowance.
12. Concluding his testimony in chief, the claimant asked the court to allow his claim as prayed.

Respondent's Case

13. The respondent called oral evidence through Mr Stephen Moche who testified as RW1. Mr Moche described himself as the managing director of the respondent and at the outset, adopted his witness statement to constitute his evidence in chief. He proceeded to produce the bundle of documents filed on behalf of the respondent as exhibits before court.
14. It was his evidence that the claimant was issued with a contract of employment. He further testified that following the altercation between the claimant and the respondent's driver, Mr Thuku, there was a follow up and both of them were called for a disciplinary hearing on February 14, 2018. That they were given a chance to be explain their actions and defend themselves. That the claimant repeatedly and voluntarily admitted to be at fault.



15. RW1 further told court that the driver was sober when he took the motor vehicle that morning.
16. That following a fair hearing, a decision was reached to terminate the claimant's employment. That the claimant was terminated for physically assaulting Mr Thuku. That his termination was lawful and was based on his gross misconduct.
17. That the claimant was paid his salary including his payment *in lieu* of notice as per his contract of service. It was also his testimony that the claimant utilized his 21 leave days hence has no pending leave days. That further, the claimant's salary was all inclusive as his contract of employment contained a provision that his salary was consolidated hence the claim for house allowance is misplaced.

Submissions

18. It was submitted on behalf of the claimant that the fact that there was a verbal invitation for a discussion gives credence that there was an informal discussion. That if the respondent intended to hold formal proceedings, nothing stopped them from documenting the entire process just as they found it fit to document the termination. That further, the claimant was never given a show cause stating the reasons for his termination and he never got a chance to submit a defence. In support of this argument, the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* (2014) eKLR was cited.
19. In further submission, it was stated on behalf of the claimant that the fact that the employer who was not present at the scene found him to blame is suspect. That this in itself proves that the reason for terminating the claimant has bias in it and further stands out as discrimination. To this end, the cases of *Silas Owiti & another v Fidelity Commercial Bank Limited* (2017) eKLR, and *Nicholas Otinyu Muruka v Equity Bank Limited* (2013) eKLR were referred to in support.
20. The respondent on the other hand, submitted that the procedure it followed is in compliance with section 41 of the *Employment Act*. Citing the case of *Kennedy Maina Mirera v Barclays Bank of Kenya Limited* (2018) eKLR, the respondent further submitted that the claimant was not unfairly terminated at all and as such, the allegations of unfair termination are baseless and unmaintainable.

Analysis and Determination

21. Having carefully considered the pleadings on record, the evidentiary material before me and the rival submissions, the following issues stand out for determination: -
 - i. Whether the termination of the claimant's employment was substantively fair;
 - ii. Whether the claimant's termination was in line with the requirements of a fair process; and
 - iii. Whether the claimant is entitled to the reliefs sought.

Substantive Fairness?

22. Substantive justification entails proof of the reason or reasons for which an employee was terminated. Pursuant to section 45(2) (a) and (b) of the *Employment Act* (Act), it is considered unfair termination where the employer fails to demonstrate that the reason for the termination is valid, fair and related to the employee's conduct, capacity, compatibility or is based on its operational requirements. Further, it is instructive to note that section 43 (1) of the Act specifically places the burden to prove that the termination was fair, on the employer.
23. In the instant case, it is apparent from the claimant's letter of termination that he was terminated on grounds that he engaged in a physical confrontation with the respondent's driver on February 13, 2018.



24. From the record, it is common ground that there was an altercation between the claimant and the respondent's driver by the name Mr Thuku on February 13, 2018. On his part, the claimant contends that it is Mr Thuku who verbally abused him and physically assaulted him and, in the process, he sustained facial injuries and his glasses were broken. It was his testimony that the said driver was drunk at the time when the incident took place. That he insulted him by uttering the following words; "mimi si bibi yako."
25. On its part, the respondent contends that the claimant physically assaulted Mr Thuku. To this end, it was RW1's testimony that the claimant punched Mr Thuku when the motor vehicle was in motion. RW1 further denied the claimant's assertions that Mr Thuku was drunk at the time.
26. Going by the narration of the events by both sides, it is evident that this is a case of "he said she said". It is not clear from the record which side's version is believable in the circumstances. This is compounded by the fact that the respondent's driver, Mr Thuku was not called in as a witness to testify regarding the events of February 13, 2018. In addition, there was no statement from his end, describing what transpired on the said date. After all, he was the main complainant and thus the star witness. In this case, it is only Mr Thuku and the claimant who were suitable witnesses to speak on what transpired on February 13, 2018. In this context, RW1's evidence can at best be termed as hearsay as he was not present when the altercation took place.
27. In line with the evidential requirement stipulated under section 43 of the Act, the respondent was liable to prove and substantiate to the requisite standard, the allegations regarding the claimant's alleged altercation with Mr Thuku.
28. An allegation relating to an altercation which is both verbal and physical, as in the case herein, is quite subjective hence, there is need for concrete evidence to prove the same on a standard of probability. With the evidence of Mr Thuku missing conspicuously from the record, it becomes almost impossible for the court to ascertain a fact that the claimant was largely to blame for the altercation. The accusations against the claimant were therefore not corroborated in any form or manner.
29. In the circumstances, I am unable to find substance in the reason leading to the claimant's termination.
30. I am therefore not convinced that the respondent has discharged its evidential burden by proving that it had a valid and fair reason to dismiss the claimant from employment.

Fair Process?

31. Over and above proving the reasons for an employee's termination, an employer is required under section 45(2) (c) of the Act to subject an employee to a fair process prior to termination. The specific requirements of a fair process are provided for under section 41 of the Act. In this regard, the procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to be heard in response to the said allegations in the presence of a union representative or an employee of his or her own choice.
32. In this case, the respondent contends that the claimant was called in for a disciplinary hearing on February 14, 2018 and given a fair chance to explain his actions. To this end, the respondent exhibited minutes of the disciplinary hearing held to that effect. The claimant does not dispute being called on February 14, 2018 to explain his actions. His contention is that following the said meeting, they were informed that the matter had ended there.
33. From the record, it is not clear whether the claimant was notified before appearing for the meeting of February 14, 2018 that the same was a disciplinary hearing and that he was required to explain his



actions with regards to the events of February 13, 2018. I say so because there is no formal notice on record as contemplated under section 41 of the Act.

34. Indeed, it is not clear whether going in for the meeting of February 14, 2018, the claimant was made aware that his alleged actions were likely to result in his termination from employment. Did he have time to contemplate the allegations against him and the possible consequences? I highly doubt. This is further noting the time frame between the claimant's alleged conduct and the date of the meeting. It was hardly 24 hours apart.
35. On this issue, I find useful guidance on the case of *Nebert Mandala Ombajo v Institute of Certified Public Accountants of Kenya (ICPAK)*, Nakuru civil appeal No 62 of 2018, in which the Court of Appeal had this to say: -

“The respondent has not justified the urgency in undertaking the disciplinary proceedings on the March 4, 2014 when the letters were only written on March 3, 2014. [27] Disciplinary proceedings are a grave matter for an employee as the consequences may be catastrophic to the employee's life. In the case of the appellant, the complaints against him were serious, and there is no doubt that he needed sufficient time to prepare psychologically, and if need be, get the best advice that he could.”

36. Applying the determination in the above case to the instant case, I cannot help but find that when considered as a whole, the process applied by the respondent in terminating the claimant's employment was not in accord with the spirit of section 41 of the Act hence rendered the termination unlawful.

Reliefs

Compensatory damages

37. Having found that the claimant's termination was unfair, I will award him compensatory damages equivalent to six (6) months of his gross salary. This award has taken into consideration the length of the employment relationship and the fact that the respondent did not prove the reasons for the claimant's termination and applied a flawed process in so doing.

House Allowance

38. Before I delve into this issue, I find it imperative to address the issue of the authenticity of the contract of employment exhibited by the respondent as it provides for the component of salary.
39. It is worth mentioning at this juncture that the claimant disowned the said contract of employment and denied signing the same. What the claimant is essentially saying is that the signature appearing on the said contract of employment is not genuine and that the same is an act of forgery. Having alleged as much, it was incumbent upon him to prove the same. It is trite law that “he who alleges must prove”.
40. On this score, I find the following expression from the Court Appeal in the case of *Demutilla Nanyama Pururmu v Salim Mohamed Salim* [2021] eKLR, to be apt: -

“As the appellant was the one claiming that the documents were forgeries, the burden was on her to prove that the documents were not authentic government documents as claimed by the respondent. Section 107 of the *Evidence Act*, provides as follows: -

- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

41. Turning to the case herein, the claimant did not lead any evidence to discount the authenticity of his signature as appearing in the contract of employment. As a matter of fact, he did not deny the said contract of employment in his reply to the statement of response. His denial only came at the hearing stage.
42. If I may add, the court does not have the expertise to examine documents and handwritings in order to determine whether or not they are authentic. I find it quite unfair to the court, to have parties disown documents and signatures without providing the requisite proof. How is the court to discern this fact and ascertain the authenticity of the signatures on record?
43. In light of the foregoing, the court has not been given a plausible reason to doubt the authenticity of the contract of employment hence I am enjoined to consider the same.
44. Turning to the relief for house allowance, the claimant has placed reliance on his payslip which he avers, only contains the component of basic salary. With due respect, that argument cannot stand, since a payslip is not the appropriate source of reference in interpreting contractual terms of employment between parties. Such was the holding by the Court of Appeal in the case of *Grain Pro Kenya Inc Ltd v Andrew Waitihaka Kiragu* (2019) eKLR, thus: -

“Counsel for the appellant invited us to look at the payslip that indicated the sum of USD 600 was the gross salary. We hold the primary document of contract here was the letter of appointment as the pay slip does not constitute a contract.” Underlined for emphasis
45. In this case, the contract of employment exhibited by the respondent, indicates that the claimant’s salary was consolidated. It would thus mean that the same was inclusive of the allowances payable to him. Be that as it may, a finding as to whether this remedy lies, is dependent on whether the said salary despite being consolidated, amounted to an underpayment.
46. That said, I will now proceed to consider the claim for underpayment.

Underpayment

47. The claimant has claimed underpayment in the sum of Kshs 266,554.60 covering a period of 5 years 2 months. From the contract of employment exhibited, the claimant was employed as a machine assistant. In terms of legal notice No 196 of 2013, the minimum statutory wage payable to a machine assistant was Kshs 11,085.70. This was exclusive of house allowance. Therefore, in total, he was entitled to a minimum consolidated salary of Kshs 12,748.55 (being 15% of Kshs 11,085.70 + Kshs 11,6085.70). As the claimant did not prove or state the amount of salary he was earning during this period (May 1, 2013, 2014 and upto April 30, 2015), it is not possible to ascertain whether indeed he was being underpaid.
48. With regards to the period beginning May 1, 2015 upto April 30, 2017, the statutory minimum wage payable to the workers in the category of the claimant was Kshs 12,416.00. Pursuant to legal notice No 116 of 2015, he was entitled to a minimum consolidated salary inclusive of house allowance, of Kshs 14,278.40 (being 15% of Kshs 12,416.00 + Kshs 12,416.00). From the payslips exhibited in respect of 2016, the claimant was earning salary of Kshs 14,000.00. Therefore, he was underpaid to the tune of Kshs 278.40.



49. In respect of the period starting May 1, 2017 upto February 28, 2018, the the statutory minimum wage payable to workers in the category of the claimant was Kshs 14,650.00. Inclusive of house allowance, he was entitled to a minimum consolidated salary of Kshs 16,847.50 (being 15% of Kshs 14,650.00 + Kshs 14,650.00). This is pursuant to legal notice No 111 of 2017. From the record, the claimant was at the time earning a monthly salary in the sum of Kshs 14,650.00. This was below the minimum consolidated wage hence amounted to an underpayment. He is therefore entitled to compensation to the extent of the underpayment.

Accrued Leave Pay

50. With regards to the claim for accrued leave pay, the same succeeds but is limited to 18 months preceding the claimant's exit from the respondent's employment. This is pursuant to section 28(4) of the Act which provides as follows: -

“The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1)(a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.”

51. This award has been made on the basis that the respondent failed to produce the claimant's leave records in line with its obligation under section 74(1) (f) of the Employment Act hence there was no evidence of the leave days he had utilised and vice versa.

Orders

52. Accordingly, I enter judgment in favour of the claimant against the respondent in the following manner: -

- a. A declaration that the claimant's termination by the respondent was unfair and unlawful.
- b. The claimant is awarded compensatory damages in the sum of Kshs 101,085.00 which sum is equivalent to 6 months of his gross salary.
- c. The claimant is awarded accrued leave pay in the sum of Kshs 17,689.35
- d. The claimant is awarded the sum of Kshs 28,656.60 (Kshs 278.4 *24 months) + (Kshs 2,197.50*10 months) being underpayments from May 1, 2015 upto February 28, 2018.
- e. The total award is Kshs 147,430.95.
- f. Interest on the amount in (e) at court rates from the date of judgement until payment in full.
- g. The claimant shall have the costs of the suit.

53. The respondent shall also issue the claimant with a certificate of service within 30 days from the date of this judgement.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

.....

STELLA RUTTO

JUDGE



Appearance:

For the Claimant Mr. Njiru

For the Respondent Mr. Kirimi

Court Assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

