



**Kinyua v JKUAT Nissin Foods Limited (Cause 257 of 2017)  
[2023] KEELRC 829 (KLR) (12 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 829 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 257 OF 2017**

**JK GAKERI, J**

**APRIL 12, 2023**

**BETWEEN**

**RACHAEL KINYUA ..... CLAIMANT**

**AND**

**JKUAT NISSIN FOODS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant commenced this suit by a memorandum of claim filed on February 10, 2017 alleging unfair termination of employment by the respondent.
2. The claimant testified that she was employed by the respondent on July 2, 2015 at Kshs 51,000/= per month, initially on probation for 3 months and was subsequently confirmed as a sales representative at JKUAT Nissin Foods Ltd and served diligently.
3. The claimant further avers that Juja Polythene Sweets and Centre gave a bouncing cheque for an unpaid invoice and only Kshs 39,000/= was recovered. That the employer pressured her to recover the balance or resign from employment.
4. It is the claimant's case that following her father's death on July 29, 2015, the claimant proceeded on compassionate leave on August 1, 2016 with consent and knowledge of the respondent and resumed duty on August 15, 2015 but was ordered to resign on August 16, 2016 but refused to do so.
5. That she received a termination letter on September 9, 2016 signed by one Toku Yokoyama.
6. The claimant prays for;
  - a. Special damages of Kshs 774,250/= comprising;
    - i. One month's salary *in lieu* of notice Kshs 51,000/=
    - ii. 12 month's salary Kshs 612,000/=.



- iii. 9 days worked in September 2016.
  - iv. Airtime allowance and transport September 2016 Kshs 3,300/=.
  - v. Gratuity for one year Kshs 51,000/=.
  - vi. 24.5 pay in lieu of leave Kshs 41,650/=.
- b. General damages.
  - c. Interest on (a) and (b) above.
  - d. Costs of this suit.

### **Respondent's Case**

7. In its memorandum of defence, the respondent denies having terminated the claimant's employment unfairly. It avers that following warnings and consultations between the parties respecting the claimant's conduct and performance of her duties, the claimant expressed interest to resign and the respondent agreed to do so. The resignation was to be effective September 1, 2016 but failed to do so and the respondent issued a termination notice.
8. That the suit herein is brought in bad faith and as an afterthought.
9. The respondent denies that termination of the claimant's employment was unlawful or arbitrary.
10. The respondent, however, admits that it employed the claimant on June 2, 2015 under a contract dated June 25, 2015.
11. That the claimant's position as a sales representative changed owing to her inability to deliver the role.
12. The respondent further avers that sometime in September 2015, the respondent received a report of the claimant's misconduct which the respondent's Management discussed at its meeting held on September 30, 2015.
13. That the claimant (wrongfully described as respondent) had been rude to 3 of her colleagues but no action was taken as the Sales Manager had given a verbal warning but her conduct persisted and did not improve on performance despite several warnings.
14. That meetings convened by the respondent's Managing Director and Director Administration & Human Resource with the claimant to resolve the issues in August 2016 culminated in her agreement to resign on September 1, 2016 but she did not.
15. The respondent avers that the termination was occasioned by her resignation.
16. As regards the reliefs sought, the respondent avers that the claimant is not entitled to the same as;
  - i. She voluntarily resigned on September 1, 2016 and the respondent acted lawfully.
  - ii. Her contract of employment with the respondent had no provision for gratuity.
17. The respondent admits that the claimant is entitled to Kshs 17,000/= as leave pay for 10 days.
18. The respondent prays for dismissal of the claimant's case with costs.
19. In her response to the respondent's defence, the claimant avers that she neither offered to resign at any time nor was she issued with verbal or written warnings, though the respondent had threatened to



terminate her employment and subjected her to sustained pressure to resign after resuming duty in mid-August but declined.

20. That she was not taken through any disciplinary hearing.
21. The claimant further avers that she did not attend any meeting with the Managing Director and Director Administration & Human Resource of the respondent and did not offer to resign.

### **Claimant's Evidence**

22. The claimant adopted the written statement which rehashes the contents of the memorandum of claim.
23. The respondent did not adduce evidence in support of its claim.

### **Claimant's Submissions**

24. The claimant's counsel identified two issues for determination, namely;
  - i. Whether termination of the claimant's employment was unfair.
  - ii. Whether the claimant is entitled to the reliefs sought.
25. As to whether termination of the claimant's employment was unfair, counsel submitted that the claimant's employment was terminated by letter dated September 9, 2016.
26. Counsel relied on the provisions of section 45 of the *Employment Act*, 2007 to underscore the essence of fair termination of employment.
27. Counsel submitted that termination of the claimant's employment was unfair as the respondent had no reason to do so.
28. That neither the alleged refusal to resign nor the warnings, performance nor conduct was established by evidence.
29. Reliance was also made on the provisions of sections 43 and 46 of the *Employment Act* to demonstrate the burden of proof of the employer as well as the grounds and circumstances that do not constitute reasons for dismissal such as proceeding on leave.
30. Reliance was also made on the decision in *Co-operative Bank of Kenya Ltd v Banking, Insurance & Finance Union* (2017) eKLR to reinforce the submission on the essence of the reason(s) for termination of employment.
31. On procedural fairness and essence of section 41 of the *Employment Act*, counsel relied on the provisions of section 41 of the *Employment Act* and the decisions in *Joseph Mwaniki Nganga v United Millers Ltd* (2022), *David Gichana Omuya V Mombasa Maize Millers Ltd* (2014) eKLR and the sentiments of Lord Denning in *British Leyland UK Ltd V Swift* (1981) IRL 91 on the reasonable test for dismissal of an employee.
32. As regards the reliefs sought, reliance was made on the provisions of section 49 of the *Employment Act* as well as section 12(2) of the *Employment and Labour Relations Court Act*, 2011 to urge that the claimant had proved her case and was entitled to the reliefs sought.

### **Determination**

33. The issues for determination are;



- i. Whether termination of the claimant’s employment was unfair.
  - ii. Whether the claimant is entitled to the reliefs sought.
34. As regards the burden of proof in an undefended suit or where the respondent opts not to participate in the trial, the sentiments of Onyango J in *Humphrey Munyithya Mutemi V Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR are instructive;
- “In the case of *Monica Karimi Mutua V Al-Arafat Shopping Centre & another* (2018) eKLR, the court held that in an undefended claim, it is trite that the claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”
35. Abuodha J expressed similar sentiments in *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* (2016) eKLR as follows;
- “This burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at trial. The claimant must still prove his or her case. . .”
36. These sentiments re-emphasize the provisions of the *Evidence Act*, specifically section 107, 108 and 109, that he who alleges is duty bound to prove the allegations made.
37. As regards termination of employment, both the provisions of the *Employment Act* and case law are unequivocal that for a termination to pass muster, it must be substantively justifiable and procedurally fair.
38. While the provisions of sections 43, 45 and 47(5) of the Act address substantive justification, section 41 and 45(2)(c) address with procedural fairness.
39. In the often cited sentiments of *Ndolo J in Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, the judge stated;
- “However, 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.”
40. The Court of Appeal expressed similar sentiments in *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR.
41. Section 45(2) of the *Employment Act* which provides;
2. A termination of employment by an employer is unfair if the employer fails to prove –
    - a. that the reason for the termination is valid;
    - b. that the reason for the termination is a fair reason;
      - i. related to the employee’s conduct, capacity or compatibility; or
      - ii. based on the operational requirements of the employer; and
    - c. that the employment was terminated in accordance with fair procedure.
42. I will now proceed to apply the foregoing provisions and propositions of law to the facts of the instant case.



## Reason for Termination

43. It is not in dispute that the claimant proceeded on compassionate leave sometime in early August, 2016 with knowledge and consent of the respondent and testified that she resumed duty on August 15, 2016 and received a termination letter on September 9, 2016.
44. Contrary to the claimant’s counsel submission that she may have been terminated on account of proceeding on leave, the claimant adduced no evidence to that effect.
45. The claimant’s evidence was silent on why she was called upon to resign.
46. Be that as it may, the termination letter dated December 9, 2016 is explicit that the reason for termination of the claimant’s employment was that the claimant failed to submit her resignation letter as she had “previously opted.”
47. Regrettably, the respondent did not tender evidence and its counsel ceased to act on its behalf for failure to obtain instructions from the respondent and their application dated November 25, 2021 was allowed on April 28, 2022.
48. The respondent’s evidence would have contextualized the circumstances in which the termination letter was issued and demonstrate why the respondent considered the refusal to resign as a valid reason for termination of employment.
49. Section 43(2) of the *Employment Act* provides that;

The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
50. The foregoing provision notwithstanding and applying the reasonableness test in termination of employment as aptly captured by Lord Denning in *British Leyland UK Ltd V Swift (Supra)*, it is the finding of the court that the respondent has on a balance of probabilities failed to demonstrate that it had a valid and fair reason to terminate the claimant’s employment.
51. In the court’s view, refusal by the claimant to resign did not constitute a reason for termination of the claimant’s employment as its validity and fairness were not demonstrated.

## Procedure

52. Section 41 of the *Employment Act*, 2007 prescribe the procedural precepts to be complied with prior to termination.
53. The various decisions cited by the claimant’s counsel are spot on as to the place of procedural fairness in the termination of employment.
54. In *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR, the Court of Appeal stated that;

“ . . . A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination . . . ”



55. The court is further guided by the sentiments of Baari J in *Joseph Mwaniki Nganga V United Millers Ltd* (*Supra*), relied upon by the claimant’s counsel that;

“In view of the provisions of section 41 of the *Employment Act*, the employee’s right to be heard whenever an employer is contemplating termination is a sacrosanct right. It cannot therefore be taken away through invocation of a termination clause.”

56. The specific tenets of procedural fairness under the provisions of section 41 of the *Employment Act* have been articulated in legions of decisions including by the court of Appeal in *Postal Corporation of Kenya V Andrew K Tanui* (2019) eKLR, 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 is made;
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

57. Applying the foregoing provisions and propositions of law to the instant case, it requires no gainsaying that the procedural requirements prescribed by section 41 of the *Employment Act* were not complied within the instant case.

58. The respondent tendered no evidence that it took the claimant through a disciplinary process before her dismissal from employment on September 9, 2016.

59. In sum, it is the finding of the court that termination of the claimant’s employment was neither substantively justifiable nor procedurally fair.

Reliefs

a. One month’s salary *in lieu* of notice Kshs 51,000/=

60. The respondent adduced no evidence that it accorded the claimant the requisite notice as provided by clause 16(1) of the contract of employment dated June 25, 2015 or pay *in lieu* of notice.

The sum of Kshs 51,000/= is awarded.

b. 9 days worked in September 2016 Kshs 15,300/=

61. The claimant’s employment was terminated on September 9, 2016 and the respondent tendered no evidence that it paid her for the 9 days. The claimant testified in court that she was not paid for the 9 days.

The claimant is awarded pay for 9 days worked in September 2016.

c. Airtime and Transport Allowance Kshs 3,300/= for September 2016

62. Neither the written statement nor the oral evidence adduced in court or the contract of employment make reference to these allowances and how much was payable for each.

In the absence of evidential justification, the prayer is declined.



- d. Gratuity amounting to Kshs 51,000/=
63. Similarly, the claimant tendered no evidence of entitlement to gratuity. The contract of employment dated June 25, 2015 made no reference to gratuity, which is typically a contractual term under the contract of employment or Collective Bargaining Agreement (CBA).
- The prayer is unproven and is declined.
- e. 24.5 days pay *in lieu* of leave Kshs 41,650/=
64. In her oral testimony in court, the claimant testified that she had not proceeded on leave and was claiming Kshs 41,650/= for the outstanding leave days.
65. The respondent adduced no evidence that the claimant had proceeded on leave.
66. The claimant is awarded pay *in lieu* of leave for the actual number of days outstanding.
- f. 12 months salary
67. Having found that termination of the claimant's employment was unfair for want of a substantive justification and procedural propriety, the claimant is entitled to the relief provided by section 49(1) (c) of the Employment Act subject to compliance with the provisions of section 49(4) of the Act.
68. Consequently, the court has considered the following;
- i. The claimant was an employee of the respondent for about 1 year and 2 months, a fairly short time.
  - ii. The claimant had no record of previous warning or disciplinary hearing.
  - iii. The claimant did not appeal the decision of the respondent or demonstrate her wish to continue in employment.
  - iv. Although the claimant testified in court that termination of her employment was malicious, from the letter of termination whose contents the claimant did not contest, it is evident the issue of resignation had been discussed and an agreement would appear to have been arrived at. This would perhaps explain why the letter uses the non-resignation as the reason for termination of employment. In the essence, the claimant contributed to the termination, the reason notwithstanding.
69. For the foregoing reasons, the court is satisfied that the equivalent of two (2) months' salary is fair.
- g. General damages
70. The claimant adduced no evidence of entitlement to general damages. The prayer is declined.
71. In the upshot, judgement is entered for the claimant against the respondent in the following terms;
- a. One month's salary *in lieu* of notice.
  - b. Salary for 9 days worked in September 2016.
  - c. Pay *in lieu* of leave for the actual number of days outstanding.
  - d. Equivalent of 2 months' salary.
  - e. Costs of this suit.
  - f. Interest at court rates from date of judgement till payment in full.



It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH 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 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 *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.

**DR. JACOB GAKERI**

**JUDGE**

