



**Muriuki v Trevo Kenya (Cause 441 of 2017)  
[2023] KEELRC 837 (KLR) (12 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 837 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 441 OF 2017**

**JK GAKERI, J  
APRIL 12, 2023**

**BETWEEN**

**MARTIN MEME MURIUKI ..... CLAIMANT**

**AND**

**TREVO KENYA ..... RESPONDENT**

**JUDGMENT**

1. The claimant commenced this suit by a Memorandum of Claim filed on March 7, 2017 alleging summary dismissal of his employment by the respondent on January 5, 2017.
2. The claimant avers that he was employed by the respondent in February 2016 as a Marketing Manager in the respondent's Marketing Department and discharged his duties diligently and responsibly until the Country Director of the respondent, Bisi Okaro informed him of the termination of employment on January 5, 2017.
3. That the claimant's attempts to have his grievance resolved by the respondent fell through.
4. The claimant avers that the respondent unfairly deducted Kshs.45,000/= from his salary for a lost laptop, 4 staff bottles at Kshs.5,160/= yet he had been issued with two bottles only.
5. The claimant prays for;
  - i. The honourable court be pleased to find his termination unlawful, unfair, wrongful and illegal.
  - ii. 12 months compensation Kshs.1,440,000/=.
  - iii. 3 months salary in lieu of notice Kshs.360,000/=.
  - iv. 12 off days (Sunday and Public Holidays) Kshs.48,000/=.
  - v. Travelling allowance for 2 months Kshs.10,000/=.



- vi. Unused annual leave (21 days) Kshs.84,000/=.
- vii. Service pay (1 year) Kshs.96,923/=.
- viii. Unreasonable deduction on laptop payment and 3 extra staff bottles Kshs.15,000/=.
- ix. General damages for unlawful dismissal.
- x. Certificate of service.
- xi. Costs of this suit.
- xii. Interest on the award.
- xiii. Any other or further relief that this court may deem fit to grant.

### **Respondent's case**

6. The respondent denied having employed the claimant or terminated his employment. It averred that the claimant was on probation and it did not issue a termination notice.
7. It is the respondent's case that any deductions made were lawful.
8. The claimant's counsel filed a Reply to the Respondent's statement of defence dated May 12, 2017.

### **Evidence**

9. The claimant rehearsed the contents of the witness statement dated March 6, 2017.
10. On August 3, 2022, counsel for the claimant could not reach the client and the respondent's counsel was absent and was therefore not ready to proceed and the hearing was slated for September 22, 2021 when both counsels were in court but the Respondent's counsel was unaware of the hearing date and notice had not been served.
11. Similarly, on October 18, 2021, counsel for the respondent was not ready and the hearing was adjourned to January 31, 2022 when neither of the parties was present and hearing was slated for June 30, 2022. The claimant's counsel was ready but the respondent was not. The court afforded the Respondent the last chance to defend the suit and scheduled the hearing on December 8, 2022 when hearing commenced at 11.15 am in absence of the respondent's counsel.
12. The respondent did not adduce evidence in support of its case.

### **Claimant's submissions**

13. The claimant's counsel submitted on unfair termination of the claimant's employment and terminal dues.
14. On the 1<sup>st</sup> issue, counsel relied on the provisions of section 43 of the Employment Act, 2007 on the duty of the employer to prove the reason(s) for termination and as well as the provisions of section 45 of the Act on the prerequisites of a fair termination of employment.
15. Counsel submitted that the claimant was neither issued with a warning letter or notice to show cause nor subjected to disciplinary proceedings. Counsel urged that the termination of the claimant's employment was unfair.



16. Reliance was made on the sentiments of the Court of Appeal in *National Bank of Kenya v Samuel Nguru Mutonya* (2019) eKLR to urge that the Respondent failed to comply with the prescribed procedure.
17. As regards terminal dues, counsel submitted that the claimant was not accorded the requisite notice and accrued leave days were not paid.
18. Counsel urged that the claimant was entitled to the reliefs claimed.

### **Respondent's submissions**

19. By February 19, 2023 when the court retired to prepare this judgement, the respondent had not filed its submissions.

### **Determination**

20. 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.
21. As to whether termination of the claimant's employment by the respondent was unfair, counsel submitted that the respondent terminated the claimant's employment without giving a reason and without abiding by the prescribed procedure. Equally, the respondent did not testify on how the parties separated in early 2017.
22. In *Humphrey Munyithya Mutemi v Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR, Onyango J. stated as follows;

“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.”
23. Abuodha J. expressed similar sentiments in *Nicholus Kipkemoi Korir v Hatari Security Guards Ltd* (2016) eKLR.
24. Documentary evidence on record prove beyond peradventure that the claimant was indeed an employee of the respondent.
25. As regards termination of employment, the provisions of the Employment Act, 2007 and case law are emphatic that for a termination to pass muster, it must be substantively justifiable in terms of the reason(s) and justification and procedurally fair in terms of the procedure employed by the Respondent.
26. The provisions of sections 41, 43, 44, 45 and 47(5) of the Employment Act encapsulate these requirements.
27. As held by the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR, the law places heavy burden upon the employer in matters germane to termination of employment or dismissal in that the employer must prove that it had a valid and fair reason to do so, the termination



was not only justifiable but was conducted in accordance with the elaborate and mandatory process prescribed by section 41 of the Employment Act.

28. The twin requirements were aptly captured 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. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
29. The Court of Appeal expressed similar sentiments in *Naima Khamis v Oxford University Press (EA) Ltd* (2017) eKLR.
30. Although the claimant maintained that his termination on January 5, 2017 was not explained to him by the respondent, documents on record reveal that the respondent appears to have had performance challenges which the respondent had raised concern about.
31. An email from Maurice Everton Barasa dated May 28, 2016 to the claimant lays bare his concerns on the absence of a Marketing strategy.
32. Relatedly, the email from Bisi Okaro, the respondent's Country Director, dated July 4, 2016 was explicit that the claimant had not rallied his department to develop a Marketing Strategy as requested more than one month earlier. The writer is clear that; “. . . therefore, take this as a warning that it will no longer be acceptable at all, . . .” The claimant was accorded 5 days to prepare a Marketing Strategy to promote sales and after 5 months, the claimant dispatched an email to the Chief Executive Officer (CEO), Mr. Mark Stevens dated December 15, 2016 which Mr. Mark Stevens responded to on the same day.
33. It is unclear as to what transpired between 15<sup>th</sup> December and 5<sup>th</sup> January, 2017.
34. Both parties are in agreement that the claimant's employment came to an end on July 5, 2017 while the claimant testified that his employment was terminated by Mr. Bisi Okaro, the respondent's Country Director, the Respondent tendered no evidence on how the employment of the claimant came to an end.
35. Significantly, the respondent did not adduce any evidence to demonstrate that it terminated the claimant's employment on the ground of poor performance.
36. The foregoing notwithstanding, it is evident the respondent did not explain how it terminated the claimant's employment.
37. Even assuming that the claimant had performance challenges, the respondent did not comply with the law in terminating his employment as explained in *Jane Samba Mukala v Ol Tukai Lodge Ltd* (2013) eKLR cited by the Court of Appeal in *National Bank of Kenya V Samuel Nguru Mutonya* (supra) that the employer must demonstrate that it had an employment policy or practice on how to measure good performance as against poor performance, has a performance appraisal mechanism or system for each employee, has explained to the employee his/her poor performance to defend him or herself or accord the employee an opportunity to address the weakness and finally be heard in the presence of a witness of his choice before termination of employment.
38. In the instance case, none of the foregoing requirements were complied with.



39. Similarly, the mandatory requirements of the provisions of section 41 of the Employment Act were not abided by.
40. The court is further guided by the sentiments of the court in [\*Janet Nyandiko v Kenya Commercial Bank Ltd\*](#) (2017) eKLR.
41. The claimant testified that he was issued with neither a warning letter nor notice of termination of employment and was not invited for a hearing prior to the termination of employment.
42. In sum, the respondent complied with neither the substantive nor the procedural aspects of termination of the claimant's employment.
43. For the above-stated reasons, it is the finding of the court that the respondent has failed to prove that termination of the claimant's employment was fair within the meaning of section 45 of the [\*Employment Act, 2007\*](#).

### **Reliefs**

44. Having found that termination of the claimant's employment was unfair for want of substantive justification and procedural fairness, I will now proceed to assess the appropriate reliefs.
  - a. 3 months' salary in lieu of notice
45. Although the claimant testified that he signed the appointment letter, he did not provide a copy of the letter so as to justify the claim for 3 months salary in lieu of notice.
46. While it is evident that the respondent did not comply with the provisions of section 35 or 36 of the [\*Employment Act\*](#), the claim for 3 month's salary is unproven and the claimant is awarded one month's salary being the average of the last three (3) month's salary.
  - b. 12 off-days (Sunday & public holidays)
47. Neither the written statement nor the oral evidence adduced in court provide the particulars of this claim.

The prayer is disallowed.

  - c. Travelling allowance for 2 months
48. The particulars of this prayer were neither provided in the written statement nor in oral evidence.

The prayer is declined.

  - d. Unused annual leave 21 days
49. The respondent adduced no evidence to prove that the claimant proceeded for leave for the duration he served as an employee from February 2016 to January 5, 2017.

The claimant is awarded leave pay for the duration served.

  - e. Service pay for 1 year
50. The payslip on record shows that the respondent deducted the claimant's NSSF contributions and the claimant provided no evidence to demonstrate that he was not a member of the NSSF.

The prayer is declined.



- f. Compensation for gross and unreasonable deduction on laptop payment and 3 extra staff bottles
51. The claimant admitted that he misplaced a laptop entrusted to him and a deduction ensued. However, the claimant provided no evidence of value of the laptop to justify the prayer.  
The prayer for the deduction for the laptop is declined.  
The prayer for the deduction for the staff bottles is awarded, Kshs.2,580.00.
- g. 12 months compensation
52. Having found that termination of the claimant's employment was unfair, the claimant is eligible for the discretionary relief provided by section 49(1)(c) of the *Employment Act*.
53. In determining the level of compensation, the court has taken into consideration the following;
- i. The claimant as an employee of the respondent for less than one year, a relatively short time.
  - ii. The claimant was neither given a termination notice nor taken through a disciplinary process.
  - iii. The claimant had been issued with a warning on his performance.
  - iv. The claimant did not appeal the termination of employment or demand a written explanation on the termination of employment.
  - v. The claimant did not wish to continue in the respondent's employment.
54. In the circumstances, the court is satisfied that the equivalent of 2 month's gross salary is fair.
- h. General damages for unlawful dismissal
55. The claimant adduced no evidence to demonstrate entitlement to this prayer. It is declined.
- i. Certificate of service
56. The claimant is entitled to a certificate of service by dint of section 51 of the *Employment Act*.
57. In conclusion, judgement is entered for the claimant against the respondent in the following terms.
- a. One month's salary in lieu of notice.
  - b. Deduction of staff bottles Kshs.2,580/=.
  - c. Equivalent of 2 month's salary gross salary.
  - d. Certificate of service.
  - e. Costs of this suit and 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 March 15, 2020 and subsequent directions of April 21, 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**

