



**Kithuka & 2 others v Herisquare Limited (Cause 729 of 2016)
[2023] KEELRC 1438 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1438 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 729 OF 2016
K OCHARO, J
MAY 31, 2023**

BETWEEN

**CHARLES MUOKA KITHUKA & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2
OTHERS CLAIMANT**

AND

HERISQUARE LIMITED RESPONDENT

JUDGMENT

Introduction

1. On the 29th November 2018, this Court directed that cause numbers, 731 of 2016- Whycliff Okal Oganga v Herisquare Limited and 2229 of 2015- Ruth Mwikari muia v Herisquare Limited be consolidated with cause number 729 of 2016-Charles Muoka Kithuka v Herisquare Limited. The latter matter was made the lead file. In their respective statements of claim the Claimants had sought for; a declaration that the Respondent's action of dismissing them from employment was unlawful, unfair and un-procedural; an order against the Respondent for payment of their terminal dues; compensatory damages; and costs of the suit and Interest.
2. The Memorandums of Claim were filed together with the Claimants' witness statements and documents that they intended to place reliance on as evidence in chief and documentary evidence, respectively, in support of their cases.
3. Upon being served with the summons to enter appearance, The Respondent did enter appearance on the 6th April 2017, and filed a Reply to the Claimants' respective Memorandums of Claim, denying their causes of action and entitlement to the reliefs sought.
4. The case came up for hearing on the 5th May 2022, when the Claimants were heard, in the absence of the Respondent and or its Counsel.



The 1st and 2nd Claimants 'case

5. The 1st and 2nd Claimants stated that they were employed by the Respondent on the 1st October 2014 and 20th November 2014, respectively as bar attendants. At the date of termination of their employment, their salary was KShs 12,500 per month.
6. The Claimants contended that on the 2nd March 2015, customers were served at the Respondent's establishment. In the process a majority of them gave the waiters serving them double orders, in the sense that they could order for an item, only to exchange the same later with another item of the same price. This led to an imbalance in the physical stock and the point of sale (P.O.S), a reconcilable variance. The reconciliations were usually done the following day of service.
7. They stated that the Food and Beverage Manager one Mr. Stephen Ndwiga instructed them to clear the waiters before remitting the money they had collected, assuring them that reconciliation of accounts was to be done the following day.
8. It was their case that when the accounts were taken the following day, the waiters were found with a deficit of KShs 17,000, in terms of unpaid bills. Without justification, the amount was charged on them, each being deducted KShs 8,500 from his February 2015 salary, to satisfy the deficit. The shortage if any ought to have been shouldered by the waiters and not them as their work was strictly at the counter and not serving of food and drinks at the bar.
9. They contended that the Respondent unjustifiably deducted KShs 2,500 from their January 2015 salary claiming that it was the City council's fine for stocking of expired products.
10. The Claimants averred that on the 5th March 2015, they reported to the Human Resource Manager as instructed and amidst insults from the Food and the Beverage Manager they were issued with termination letters. Prior to the dismissal, they were neither issued with any show cause notice nor given an opportunity to defend themselves against any accusations.
11. They alleged that they used to work from 8.00 am to 7.00 pm, therefore working overtime, however, the Respondent never compensated them for the work.
12. The Claimants asserted that the Respondent's action was wrongful, and unfair. It was in breach of, the mandatory provisions of the [Employment Act](#), the principles of natural justice and their Constitutional rights to fair labour practice.

The 3rd Claimant's case.

13. The 3rd Claimant first came into the employment of the Respondent on the 1st September 2014 as a Food and Beverage Controller, a position she held until 13th February 2015, when her employment was terminated. At the time of her termination, she was earning a monthly salary of KShs 25,000.
14. During her tenure with the Respondent, her working schedule was from 8.00 am to 7.00 pm and sometimes beyond throughout the week, save for Tuesdays which were her off days.
15. The 3rd Claimant testified that on the 9th and the 13th December, 2014, The General Manager gave instructions for food to be prepared, instructions which were complied with. Unfortunately, the same was not consumed as expected since not all the anticipated customers turned up. Consequently, he directed that which wasn't by customers be by staff members. This resulted to an unexpected expenditure of KShs 36000.



16. The Claimant contended that on the 13th February 2015, the Human Resource Manager one Ms Rachel instructed her not to report to work on the following day but on the Monday the 16th February 2015, for clearance with the Respondent. Later on, she asked her to stay off job until informed when to report back.
17. It was stated that on the 6th March 2015, the Accountant one M/s Njeri through a text message informed her to go and collect her dues. She went to pick the dues, only to be issued with a termination letter dated the 8th February 2015. The grounds that were put forth in the letter were not valid.
18. She stated that the termination was not preceded by any opportunity to her to defend herself against the grounds. Therefore, the termination was wrongful, unfair, in breach of mandatory provisions of the Employment Act and the principles of natural justice.
19. The Claimants contended that the termination of their employment was aggravated by the fact that the Respondent declined to pay them their terminal dues and damages, thus;
 - a. 1st Claimant, Charles Muoka
 - i. One month's salary *in lieu* of notice.....Ksh 20,000
 - ii. Payment *in lieu* of unpaid/Untaken leave for the entire period of the contract being Ksh 20,000 X 1 year.....Ksh 20,000.
 - iii. Overtime for 7 extra hours worked daily.Ksh 105,000.
 - iv. Compensations for the illegal deductions made on his salary being Ksh 8500 and Ksh 2500.....Ksh 11,000.
 - v. Salary for the remaining contract period (being ksh 20,000 X 7) Ksh 140,000.
 - vi. Compensation for the unfair termination 12 months' gross salary.....Ksh 240,000.
 - b. 2nd Claimant, Wycliff Okal Oganga.
 - i. One month's salary *in lieu* of notice.....Ksh 12,500
 - ii. Payment *in lieu* of the unpaid or untaken leave for the entire contract period.....Ksh 12,500.
 - iii. Overtime for the extra 4 hours worked daily.Ksh 22,500.
 - iv. Compensation for the illegal deductions made on his salary being Ksh 8500 and Ksh 2500.....Ksh.11,000
 - v. Salary for the remaining contract period being Ksh 12,500 X 9 MonthsKsh 112,500.
 - vi. Compensation for unfair termination 12 months' gross salary....Ksh 150,000.
 - c. 3rd Claimant, Ruth Mwikali Muia.
 - i. One month's salary in lieu of notice.....Ksh 25,000.



- ii. Payment in lieu of the unpaid/Untaken leave for the entire contract period.....Ksh 25,000
- iii. Overtime for the extra hours worked daily.Ksh 45,000.
- iv. Salary for the remaining contract period being Ksh 25,000 X 7 Months.....Ksh 175,000.
- v. Compensation for unfair termination at the 12 months gross salary being 25,000 X 12 months.....Ksh 300,000.

The Claimants’ submissions.

20. The Claimants filed their written submission on the 24th June 2022 urging the court to consider and determine three issues thus;

- i. Whether there were valid reasons warranting the Claimants’ dismissal from employment.
- ii. Whether there was fair procedure applied before disengaging the Claimants from their employment.
- iii. Whether the Claimants are entitled to the reliefs sought.

21. On the first issue, Counsel for the Claimants submitted that though the Respondent in its pleadings asserted that the 1st and 2nd Claimants were discharged from employment on the reason that they violated the workplace procedures concerning orders and payments, it didn’t place forth any evidence to establish that. To the contrary, the Claimants were able to demonstrate to court that in the discharge of their duties, they didn’t directly interact with customers.

22. It was further submitted that Section 43 of the *Employment Act* enjoined the Respondent to prove the reason[s] for the termination of the Claimants’ employment. Absence of any evidence on the reason[s] by the Respondent, rendered the termination unfair by dint of the provisions of Section 45 of *the Act*.

23. On the second issue counsel submitted, that section 41 of *the Act* placed upon the employer an obligation to adhere to the fair procedure in the process leading to the termination of employee’s employment. The Respondent in this matter didn’t adhere to the stipulations of the section as it didn’t, notify the Claimants the grounds upon which it was intending to terminate their employment, and accord them an opportunity to defend themselves against the accusations. That the Provisions of the section are mandatory for employers to follow, reliance was on the holding in *Kenya Ports Authority v Fadhil Juma Kisuuwa* 2017 eKLR where it was held;

“We have said earlier that where the dismissal is on the grounds of misconduct, poor performance or physical incapacity, the employer by the provisions of section 41 is bound not only to explain the reasons for which the employee’s dismissal is contemplated but also hear and consider representations he may have. At the disciplinary hearing the employee is entitled to have in attendance, if he wishes another employee or a shop floor union representative of his choice. This requirement only imposes a duty on the courts to hear the employee in the presence of his colleagues where the employee wishes them to be present. The court cannot impose them on the employee. It must however be stressed that the necessity of the oral hearing will depend on the subject and the nature of the dispute, the whole circumstance of a particular case.



24. On the last issue, it was submitted that having proved that termination of their employment was wrongful and unfair, they are entitled to all the reliefs sought.

The Respondent's submissions.

25. The Respondent filed its written submissions on the 4th July 2022 distilling three issues for determination;
- i. Whether the Claimants were unfairly dismissed from employment.
 - ii. Whether fair procedure was applied before disengaging the Claimants from employment.
 - iii. Whether the Claimants are entitled to the reliefs sought.
26. Counsel for the Respondent submitted that the reasons that led to the dismissal were genuine and warranted. The Claimants were given several warnings prior to the termination of their employment. They failed to adhere to the workplace procedures that they were expected to and conducted themselves in an unprofessional manner leaving the Respondent with no choice but to terminate their employment contracts.
27. It was submitted further that the Respondent had valid and fair reasons to terminate the Claimants' employment. Consequently, the legal burden that was on it courtesy of the provisions of section 43 and 45 of the *Employment Act*, was discharged. The test is whether any reasonable employer would dismiss an employee on the grounds. To buttress this point, reliance was placed on the holding in the case of *Judicial Service Commission v Gladys Boss Shollei & Another* 2014 eklr and the *British Leyland UK Limited v Swift* (1981) 1 RLR 91 where Lord Denning held;
- “Was it reasonable for the employer to dismiss him, if no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him then the dismissal was fair.”
28. On procedural fairness, the Respondent submitted that the Respondent terminated the Claimants' employment in accordance with the provisions of the *Employment Act*.

Analysis and Determination.

29. From the material placed before this court, the following broad issues emerge for determination, thus;
- i. Whether the summary dismissal of the Claimants was substantively and procedurally fair.
 - ii. Whether the Claimants are entitled to the reliefs sought.
 - iii. Who should bear the cost of the suit.

Whether the termination was substantively and procedurally fair.

30. In addressing the presence of fairness or otherwise in termination of an employee's employment or summary dismissal of an employee, a Court must consider two aspects, the substantive justification and the procedural fairness. The two form the total unit of fairness in the termination or summary dismissal. Absence of these components or any of them shall render the termination or summary dismissal unfair.
31. Section 41 of *the Act* provides for the procedure that an employer contemplating to terminate an employee's contract of employment has to follow. It is now trite law, the procedure is mandatory and



any deviation from it shall render the termination or the dismissal unfair, even if there was substantive justification for the termination or the dismissal.

32. Procedural fairness entails three components based on the provisions of section 41 of the *Employment Act*. First the information or the notification component. The employer has to inform the employee against whom he or she intends to act, of the intention to and the grounds prompting the intention. The second is the hearing component, the employer has to accord the employee an opportunity to make representations on the grounds. Conjoined with this is the employee's right of accompaniment. The employer shall allow the employee to be accompanied with a colleague or a union representative [if he or she is a member of a union], during the hearing. Lastly, the employer has to consider the representations by the employee or accompanying person before deciding on the accusation[s].
33. The Claimants asserted that the termination of their employment contracts lacked procedural fairness as they were not notified that the Respondent intended to dismiss them from employment and the reasons fermenting the contemplation. The Respondent never gave them an opportunity to defend themselves against any accusations that it had against them. The burden to prove procedural fairness lay on the Respondent. In absence of evidence from the Respondent, it isn't difficult to conclude that this burden was not discharged. The Claimants' evidence wasn't challenged.
34. In the upshot, I find that the termination of the claimants' employment was procedurally unfair.
35. Whether an employee has been given previous warnings in the past or not, when an employer is contemplating terminating his or her services, the employer must expressly and unambiguously inform the employee of the contemplated action and the reasons attracting the contemplation. Presence or otherwise of warnings prior to the termination is a factor considerable when interrogating substantive fairness, the appropriateness of sanction imposed on an employee and or award of a compensatory relief under section 49[1][c] of *the Act*.
36. Regarding substantive justification, the law has laid down a framework for the same in section 45(2) of the *Employment Act*. The section provides that;

“ 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.
37. The stated Section therefore places an obligation on the employer, to after discharging his or her legal burden pursuant to the provisions of Section 43 of the Act- proving the reason[s] for the termination of an employee's employment demonstrate that the reason was valid and fair based on the grounds stated therein. Legal burdens are discharged by adduction of evidence by the party charged to. Absence of evidence by the party as was in the instant matter, leads to an easy conclusion that the burden wasn't discharged, leaving the fact or matter they were supposed to prove, unproven.
38. The Claimants testified on how their contracts of employment were terminated, and asserted that the terminations were in the circumstances of the matter, absent of valid and fair reason[s]. I have carefully considered the evidence and conclude that prima facie they managed to establish that the termination was unlawful, therefore discharging their burden under Section 47[5] of *the Act*.



39. In view of the above, the only conclusion I am able to reach is that the termination of the Claimants' contracts of employment was substantively unfair.
40. At this point it is imperative to state that the Respondent's submissions were packaged as though they were evidence in support of its defence against the Claimants' claim. The Respondent needs to be reminded that submissions have never been and cannot be a substitute for evidence. They always have no evidential value.

Whether the Claimants are entitled to the reliefs sought.

41. Having found as I have hereinabove, that the termination of the Claimants' employment was procedurally and substantively unfair, I now turn to consider the reliefs sought.

a) One month's salary in lieu of notice.

42. Before I delve deeper into considering whether or not this relief shall be availed to the Claimants, it is imperative to state that the Claimants were contradictory as regards their earnings at the time of termination of their contracts of employment. The 1st and the 2nd Claimants in their statements of claim stated that at the time of the termination they were both earning KShs 20,000 per month. They didn't place any evidence before this court demonstrating that they at any time earned this sum, which is higher than that obtaining in their contracts of employment, KShs 17,000 and KShs 12,500, respectively. The 3rd Claimant's salary of KShs 25000 was not in dispute.
43. The Claimants' contracts of employment were in nature those terminable by a twenty-eight days' notice, pursuant to the provisions of Section 35 of the Act. Having found that the termination was procedurally and substantively unfair and that the termination was without the notice contemplated in the section, I come to an unescapable conclusion that the Claimants' are entitled to notice payment pursuant to Section 36 of the Act, therefore, 1st Claimant Ksh 17,000, 2nd Claimant Ksh 12,500 and 3rd Claimant Ksh 25,000

(b). Payment for unutilized, uncompensated for leave days.

44. Annual leave is provided for under Section 28 of the *Employment Act*. It is therefore a statutory right for the employees, and an obligation on the employers to accord the employees an opportunity to enjoy right. Where an employee does not use his leave days, he or she is entitled to compensation in line with the employment contract or the statutory provisions. However, it is imperative to state that the right cannot be out contracted. The Court notes that the Claimants 'contracts of employment didn't provide for annual leave for them. The Claimants' evidence to the effect that they didn't not at any time enjoy their leave rights was not rebutted. In the upshot, this court awards compensation to the Claimants for the unused leave days, thus; 1st Claimant KShs 11,900, 2nd Claimant KShs 8,750 and lastly 3rd Claimant KShs 17,500.

(c)Overtime for the extra hours worked.

45. The threshold for establishment of a case for compensation for overtime and I agree, was set out in the cases of *George Ongweno v Auto Litho Ltd* (2018) eKLR and the case of *Rogoli Ole Manadiegi v General Cargo Services Ltd* (2016) eKLR where it was held;

“the employees claiming overtime pay however are not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The



burden of establishing hours or days served in the excess of the legal maximum rests with the employee.”

46. The Claimants just placed tabulations before this Court regarding their claim for overtime pay. They didn't place forth sufficient evidence or any evidence geared towards establishing the claim. For instance they didn't not allege that at a particular time in the course of their employment, they brought it to the attention of the Respondent and or protest that they weren't being compensated for overtime worked.
47. Furthermore, I have had a casual look at the letters of offer of contract, the same expressly provided that the Respondent rarely paid for overtime and the employees were to sacrifice their extra time if need arose, without compensation. The Claimants wilfully consented to be bound by the terms of the contract. This coupled with the premise hereinabove, lack of evidence, the Court declines the prayer.
(d) Compensation for the illegal deductions made.
48. The Respondent didn't bring forth any evidence to controvert the 1st and 2nd Claimants' that the it unlawfully and without justification deducted from their salary, KShs 11,000 each. The Employment Act, 2007, heavily protects employees' wages and salaries. The employer can only deduct the wages or salary of an employee only for those matters and or under the circumstances contemplated under section 19 of the Act. The Act also bestows upon the employee a right to recover any sum unlawfully deducted through legal proceedings. Considering the unchallenged evidence of the Claimants, it isn't difficult to conclude that the deduction of their salary was by the Respondent, was not for the matters or under the circumstances contemplated by law. They are entitled to a refund of the deducted sum. Ksh 11,000 each.

(e) Salary for the remaining contract period.

49. From the evidence on record and specifically from the respective letters of offer of employment, it is clear and evident that the 1st Claimant's contract commenced on the 1st October 2014 and was to end on 30th September 2015, the 2nd Claimant's contract commenced on the 20th November 2014 and was to run until 20th November 2015 while the 3rd Claimant's contract was to run from the 1st September to 31st August 2015.
50. No doubt their contracts were terminated before the appointed time. However, this Court is not persuaded that the Claimants have successfully made a case for availing of a relief under this head, salary for the remaining part of the contracts. To allow itself to be so persuaded, shall set a bad precedent that contracts of employment cannot be terminated before their appointed date for whatever reason. Premature termination of a contract can only be a factor for grant of damages or enhancement of damages grantable, for wrongful and or unfair termination. To this point, the Claimants' claim under this head is declined. Compensation for the unfair termination.
51. The Claimants further sought for a compensatory award for wrongful and unfair termination. The authority to make the award flows from the provisions of section 49(1) (c) of the Employment Act and the authority is exercised depending on the circumstances of each case. The circumstances influence the grant and the extent thereof.
52. I have considered the fact that, the termination of the claimants was procedurally and substantively unfair; the Claimants' contracts of employment were not allowed to run their full course; the Claimants had served the Respondent for less than one year; and that it wasn't demonstrated that the Claimants in any manner contributed to the termination, and conclude that they are entitled to 10 months' gross salary as compensation pursuant to the forestated provision. Thus,



- i. 1st Claimant, Ksh17000 X 10Ksh 170,000.
- ii. 2nd Claimant, Ksh 12500 X 10Ksh 125,000
- iii. 3rd Claimant, Ksh 25,000 X 10.....Ksh 250,000

Who should bear the cost of the suit.

53. It is trite law that the costs shall follow the event, the Respondent is hereby condemned to bear the cost of this suit.

54. In the upshot, judgment is entered in favour of the Claimants in the following terms;

- a. A declaration that the termination of their employment was both procedurally and substantively unfair.
- b. One month's salary in lieu of notice.
 - i. 1st Claimant, Charles Muoka..... KShs 17,000.
 - ii. 2nd Claimant,Wycliff OkalKShs 12,500.
 - iii. 3rd Claimant, Ruth Mwikali.....KShs 25,000.
- c. Payment for the untaken leave.
 - i. 1st Claimant, Charles Muoka..... KShs 11,900
 - ii. 2nd Claimant,Wycliff Okal.....KShs 8,750
 - iii. 3rd Claimant, Ruth Mwikali.....KShs 17,500.
- d. Refund of the unlawfully deducted salary.
 - i. 1st Claimant, Charles Muoka.....Ksh 11,000
 - ii. 2nd Claimant, Wycliff Okal.....Ksh 11,000
- e. Compensation for the unfair termination at 10 months' gross salary.
 - i. 1st Claimant, Charles Muoka 17,000 X 10 months..... KShs 170,000
 - ii. 2nd Claimant, Wycliff Okal 12,500 X 10 months KShs 125,000
 - iii. 3rd Claimant, Ruth Mwikali 25,000 X 10 months.....Ksh 250,000.
- f. Interest on the sum awarded above from the date of this judgment till payment in full.
- g. The cost of the suit.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF MAY 2023.

OCHARO KEBIRA

JUDGE.

In the presence of



Ms. Nyakoa.....For the Claimant

Mr Chege for Ms. Chongori.....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 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 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.

OCHARO KEBIRA

JUDGE

