



Muliango v Masaka (Cause 989 of 2018) [2023] KEELRC 1345 (KLR) (29 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1345 (KLR)

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

CAUSE 989 OF 2018

JK GAKERI, J

MAY 29, 2023

BETWEEN

MONICAIMALI MULIANGO CLAIMANT

AND

CATHERINE MASAKA RESPONDENT

JUDGMENT

1. The Claimant initiated this Claim by a Statement of Claim filed on 19th June, 2018 alleging that the Respondent had unfairly and wrongfully dismissed her from employment and refused to pay her terminal benefits.
2. It is the Claimant's case that she was employed by the Respondent as a house help or domestic worker on 10th January, 2016 at a basic salary of Kshs.16,000/= under an oral agreement and served faithfully until 5th January, 2018 when her employment was terminated by word of mouth on the ground that the Respondent had hired a replacement.
3. That the Respondent did not issue a termination notice and no reason was given and attempts to discuss terminal dues fell through.
4. That she was neither housed nor paid a house allowance and had worked for more than three (3) months and was therefore a permanent employee.
5. The Claimant prays for;
 - a. A declaration that termination of employment was unlawful and wrongful.
 - b. Terminal dues amounting to Kshs.323,138.51 comprising;
 - i. One month's salary in lieu of notice Kshs.18,400/=.
 - ii. House allowance Kshs.57.600.00.



- iii. Service pay for 2 years Kshs.21,230.77.
 - iv. Annual leave for 2016 Kshs.14,861.54.
 - v. 6 days leave balance for 2017 Kshs.4,246.2
 - vi. 12 months compensation Kshs.220,800.00
- Total Kshs.337,138.51
- Less Kshs.14,000/=
- Total Kshs.323,138.51
- c. Certificate of service.
 - d. Such orders and directions as the court may deem fit to meet the ends of justice.
 - e. Costs of this suit.
 - f. Interest at court rates for (b) above.

Respondent's case

- 6. In her Memorandum of Response filed on 6th July, 2018, the Respondent denies having terminated the Claimant's employment unlawfully.
- 7. The Respondent avers that the Claimant's leave, overtime and all other entitlements under the contract of employment were duly paid as and when they accrued and the Claimant was lawfully and procedurally terminated from employment when she absented herself from duty for more than one (1) week without lawful excuse.
- 8. That the Claimant was paid a consolidated salary of Kshs.16,000/= per month.
- 9. The Respondent sought dismissal of the claim with costs.

Claimant's evidence

- 10. In her oral testimony in court, the Claimant denied having absconded duty. It was her testimony that the Respondent called her on Wednesday, she travelled back on Thursday and reported to work on Friday that week when the alleged dismissal took place by word of mouth.
- 11. On cross-examination, the Claimant confirmed that she did not proceed on leave in 2016 but did so in 2017 and was living with her children.
- 12. The witness confirmed that she had a very good relationship with the Respondent and was given a salary advance on 20th April, 2017.
- 13. That at the material time, she was upcountry on leave having travelled for a funeral and had requested for more days which she was given.
- 14. That on 31st May, 2017, she applied for 2 days to visit her daughter in school and was allowed to be away on Thursday and Friday.
- 15. It was her testimony that the Respondent called her on Wednesday evening and she travelled on Thursday.



16. That after dismissal, she travelled upcountry and the Respondent sent her Kshs.14,000/= but she was claiming Kshs.18,400/=.
17. On re-examination, the witness testified that she was neither given a letter of employment nor payslip.

Respondent's evidence

18. The Respondent was accorded sufficient time from 27th September, 2022 but did not testify allegedly due to connection challenges.
19. The Respondent is a Zimbabwean National and had since relocated to her country.

Claimant's submissions

20. Although the Claimant's counsel did not isolate any specific issues for determination, he submitted on the effect of failure by the Respondent to adduce evidence and entitlement of the reliefs sought by the Claimant.
21. On the absence of the Respondent, counsel relied on the decisions in Edward Muriga Through Stanley Muriga v Nathaniel D. Schulte, Montex Knitwear Ltd v Gopitex Knitwear Mills Ltd and Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Schulte & another [1979] eKLR to urge that the Claimant's evidence or version should be believed as the Respondent's averments were not evidence.
22. Counsel urged that there was no defence to the claim and the only issue was entitlement to the reliefs sought.
23. According to counsel, the reliefs sought should be granted as prayed as the termination of employment violated the provisions of Sections 41, 43 and 45(1) and (2) of the Employment Act, 2007.

Respondent's submissions

24. Counsel isolated two issues for determination on whether termination of the Claimant's employment was substantively and procedurally fair and entitlement to the reliefs sought.
25. On substantive fairness, counsel relied on the provisions of Sections 43 and 45 of the Employment Act, 2007 to urge that the Claimant had the habit of absconding duty whenever she proceeded on leave in December and had been warned verbally. That she was scheduled to resume duty on 3rd January, 2018 but did not allegedly due to transport challenges.
26. According to counsel, the Respondent had a valid reason to terminate the Claimant's employment.
27. On procedural fairness, counsel relied on the provisions of Section 45(5) of the Employment Act, 2007 to submit that termination of the Claimant's employment was procedurally fair.
28. As regards the reliefs prayed for, counsel urged that the Claimant's salary was above the minimum wage and was inclusive of house allowance and she was not entitled to compensation as the termination of employment was fair.

Findings and determination

29. 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.
30. Before delving into the foregoing issues, it is important to restate the law as it governs undefended suits or where the Respondent is absent from the proceedings.
31. In *Humphrey Munyithia Mutemi v Soluxe International Group of Hotels and Lodges Ltd* [2020] eKLR, Onyango J. stated as follows;
- “In the case of *Monica Kanini Mutua v Al- Arafat Shopping Centre and 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.”
32. Similarly, in *Nicholus Kipkemoi Korir v Hatari Security Guards Ltd* [2016] eKLR, Abuodha J. stated;
- “This burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at the trial. The Claimant must still prove his or her case. It is therefore not enough for the employee to simply make allegations on oath or in the pleadings, which are not backed by any evidence and expect the court to find in his or her favour.”
33. Evidently, it is the duty of the Claimant to prove his or her case to the required standard of proof as ordained by the provisions of Sections 107, 108 and 109 of the *Evidence Act*.
34. In the instant case, it is not in contest that the Respondent employed the Claimant as a house help in early 2016 and her employment was terminated on 5th January, 2018 by word of mouth.
35. The Respondent admitted that the Claimant’s employment was terminated on 5th January, 2018 but lawfully and parties have adopted opposing positions on termination of employment.
36. Needless to belabour, both the provisions of the *Employment Act*, 2007 and case law are unambiguous that for a termination of employment to pass the fairness test, it must be substantively justifiable and procedurally fair.
37. In *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, Ndolo J. stated as follows;
- “... For a termination of employment to pass the fairness test, there must be both substantive justification and 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.”
38. The Court of Appeal expressed similar sentiments in *Naima Khamis v Oxford University Press (E.A) Ltd* [2017] eKLR.

Reason for termination

39. The Claimant’s evidence that her employment by the Respondent was terminated by word of mouth on 5th January 2017 was uncontroverted and although the Respondent admitted the fact of termination, she adduced no evidence to demonstrate the circumstances in which it took place.



40. According to the Claimant, when she left for the Christmas break, the Respondent called her on a Wednesday, January 3rd 2018 and she travelled on Thursday 4th January, 2018 and reported to work on 5th January, 2018 when she was dismissed from employment on the ground that she had overstayed.
41. The Claimant tendered no evidence of the alleged call or when she was supposed to resume duty.
42. From the Claimant's evidence, it is discernible that she did not report to the workplace on the date she had agreed to which would appear to explain the reason given by the Respondent that she had engaged a replacement.
43. Regrettably, the Respondent adduced no evidence that she had a valid and fair reason to terminate the Claimant's employment on 5th January, 2018.
44. The court is guided by the sentiments of the court in *CMC Aviation v Cruisair Ltd (No. 1)* [1987] KLR 103, cited by the Claimant's counsel that;

“The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”
45. From the evidence on record, it is evident that the Respondent has not demonstrated evidentiary that it had a substantive justification to terminate the Claimant's employment on 5th January, 2018.

Procedure

46. As regards procedure, the provisions of Section 45(2)(c) and 41 of the *Employment Act*, 2007 are clear that the Respondent must prove that it conducted the termination on accordance with a fair procedure.
47. The provisions of Section 41 of the *Employment Act*, 2007 set out the specific steps the employer must comply with before termination of employment (See *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR).
48. These include; notification, reasons the employer was considering termination, entitlement of the presence of a colleague during the explanation and hearing the employees representations and/or those of the representative and determination of the case.
49. Significantly, the provisions of Section 41 of the *Employment Act*, 2007 are mandatory as held in *Pius Machafu Isindu v Lavington Security Guards Ltd* [2017] eKLR.
50. In the instant suit, there is no evidence that the provisions of Section 41 of the *Employment Act* were complied with.
51. The Claimant testified that when she reported on Friday 5th January, 2018, the Respondent informed her that she had engaged a replacement and the Claimant's services were no longer needed, evidence that was uncontroverted.
52. As adverted to elsewhere in this judgement, in her averments, the Respondent was silent on how the termination of the Claimant's employment took place.
53. In the absence of evidence to demonstrate that termination of the Claimant's employment was fair, the court is persuaded that the termination was unfair for want of procedurally propriety.



54. In sum, it is the finding of the court that termination of the Claimant's employment was neither substantively justifiable nor procedurally fair.

Reliefs

55. Having found that termination of the Claimant's employment was unfair, I will now proceed to determine the appropriate reliefs as follows;

a. Having found that the termination of employment was neither substantively justifiable nor procedurally fair, a declaration that it was unfair is merited.

b. Terminal dues

i. Salary in lieu of notice

56. The Claimant admitted that although no notice was given, she was paid Kshs.14,000/= but is claiming Kshs.18,400/= per month inclusive of housing allowance.

57. The Claimant is awarded Kshs.4,400/= as notice pay being the difference between Kshs.18,400/= and the amount paid, Kshs.14,000/=

ii. House allowance @ 15% of basic salary

58. Although the Respondent submitted that the Claimant's salary was above the minimum wage and was consolidated, no evidence was adduced to prove the fact of consolidation as required by the provisions of Section 10(7) of the Employment Act, 2007.

59. Relatedly, payment of housing allowance by the employer is not dependent on minimum wage. It is a statutory entitlement irrespective of the basic salary offered and the rate of 15% relied upon by the Claimant is reasonable as held by the Court of Appeal in Grain Pro Kenya Inc Ltd v Andrew Waithaka Kiragu [2019] eKLR.

60. Finally, the Claimant testified that she was not housed by the Respondent and was living with her children.

61. The Claimant is awarded housing allowance at 15% of the basic salary for the duration served.

iii. Service pay

62. Since the Claimant was not a member of the NSSF or other registered pension scheme, the claim for service pay is merited and the same is awarded.

iv. Annual leave 2016

63. The Claimant's statement and oral evidence are consistent that she did not proceed on leave in 2016 and is accordingly awarded pay for the outstanding/untaken leave days.

v. 6 days leave balance for 2017

64. The Claimant's written statement makes no reference to outstanding leave days in 2017.

65. On cross-examination, the Claimant was categorical that she proceeded on leave in 2017 but did not in 2016.

The prayer is declined.

vi. 12 months compensation



66. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to the discretionary remedy under Section 49(1)(c) of the Employment Act, 2007.
67. The court has considered the fact that the Claimant served the Respondent for about 2 years which is a fairly short time. Second, the Claimant did not express any wish to continue in the Respondent's employment by way of appeal or plea of reinstatement. Third, documentary evidence on record reveal that sometime in May 2017, the Claimant delayed in reporting back to her place of work. Fourth, from the evidence on record, it is discernible that the Claimant reported to the workplace after the date agreed upon with the employer.
68. In the circumstances, the court is satisfied that the equivalent of 3 months gross salary is fair.
- vii. Certificate of service
69. The Claimant is entitled to a certificate of service by dint of Section 51 of the Employment Act, 2007.
70. In conclusion, judgement is entered for the Claimant against the Respondent in the following terms;
- a. Declaration that termination of Employment was unfair.
 - b. One month's salary in lieu of notice Kshs.4,400/=.
 - c. House Allowance @ 15% Kshs.57,600/=.
 - d. Service pay for 2 years Kshs.21,230.77.
 - e. Annual leave for 2016 Kshs.14,861.54.
 - f. Equivalent of 3 months' salary Kshs.55,200/=.
- Total Kshs.152,692.31
- g. Certificate of service.
 - h. Costs of this suit.
 - i. 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 29TH DAY OF MAY 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 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 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

