



**Chepkoech v English Point Marina (Cause 63 of 2018)  
[2023] KEELRC 1301 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1301 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 63 OF 2018**

**AK NZEI, J  
MAY 25, 2023**

**BETWEEN**

**REHEMA WAHAB CHEPKOECH ..... CLAIMANT**

**AND**

**ENGLISH POINT MARINA ..... RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent vide a Memorandum of Claim dated February 6, 2018 and pleaded that she was, on December 8, 2014, employed by the Respondent as a Spa Therapist on permanent basis, earning a consolidated salary of ksh 40,250 per month, and that the Respondent neglected, failed and/or refused to give her a copy of the employment contract.
2. The Claimant further pleaded that on December 13, 2016, the Respondent served the Claimant with a termination letter which purported to dismiss her summarily on the same day that the Respondent purported to hold a sham disciplinary hearing that was unprocedural, unlawful and contrary to the rules of natural justice.
3. It was the Claimant's further pleading that the disciplinary hearing was a sham because no charge sheet was issued to the Claimant regarding the Respondent's complaint against her, the Claimant was not informed of her right to be presented at the hearing, the Claimant was not represented at the hearing, and that the Claimant's representations at the hearing were not considered in arriving at the decision to dismiss her.
4. The Claimant further pleaded that on December 14, 2016, the Respondent served her with a second termination letter sending her on suspension and inviting her to show cause; and that this amounted to revocation of the initial termination. That the entire disciplinary process was actuated by malice and bad faith, and was done in breach of the contract of employment, the *Employment Act* 2007 and rules of natural justice.



5. The Claimant set out her claim against the Respondent as follows:-
  - a. three months' salary in lieu of notice .....ksh 120,750
  - b. salary for 13 days worked in December 2016...ksh 17,442
  - c. payment for 42 untaken leave days (at 21 days x2 years) .....ksh 56,350
  - d. compensation for wrongful termination of employment .....ksh 483,000
  - e. a declaration that the termination process carried out by the Respondent was inhumane and unlawful, and amounted to unfair termination.
  - f. a declaration that the Respondent ought to issue the Claimant with a certificate of service.
  - g. costs of the suit and interest.
6. Other documents filed by the Claimant included an affidavit in verification of the claim, the Claimant's written witness statement filed alongside the memorandum of claim and list of documents dated February 6, 2028 listing five documents. The listed documents included a termination letter dated December 6, 2016, a termination letter dated December 14, 2016, a demand letter date February 7, 2017, a copy of the Claimant's payslip for the month of October 2016 and the Claimant's response letter dated December 19, 2016.
7. The Respondent filed a Memorandum of Response on September 18, 2018, denying the Claimant's claim and stating that the Claimant was invited for a disciplinary meeting on December 13, 2016 and it was resolved that the Claimant's transgressions amounted to gross misconduct necessitating summary dismissal, that the disciplinary hearing was appropriately and procedurally convened, and that the Claimant was given an opportunity to make representations which were considered in the final determination.
8. The Respondent further pleaded that the Claimant's certificate of service is available at the hotel, and that the duty to collect it was on the Claimant.
9. Other documents filed by the Respondent included a written witness statement of one Nazir Jinnah, a director of the Respondent, dated September 21, 2022, a witness statement by one Saima Bakhrani dated March 26, 2019, and a list of documents dated March 27, 2019 listing some nine documents. The listed documents included an undated summary report on the Claimant's behavior, two warning letters dated November 1, 2016, minutes of a disciplinary meeting held on December 13, 2016, termination letter dated December 13, 2016, minutes of a disciplinary meeting held on December 14, 2016, termination letter dated December 14, 2016, minutes of a disciplinary meeting held on December 21, 2016 and a termination letter dated December 20, 2016.
10. When the suit came up for hearing on October 6, 2022, a date fixed by the Court in the presence of Counsel for both parties, there was no appearance on the part of the Respondent. The Claimant testified and adopted her witness statement filed in Court on February 7, 2018 as her testimony, and produced in evidence the documents referred to in paragraph 6 of this judgment. The Claimant further testified:-
  - a. that the Claimant was unfairly terminated vide a letter dated December 6, 2016, that she (the Claimant) had not been issued with any notice before the termination, and that there were no disciplinary proceedings before the termination.



- b. that on December 13, 2016, the Claimant received a phone call from the Respondent to go and see the Respondent's Human Resource Manager on the same date without being told the purpose and that when she went, a meeting took place and that on December 14, 2016, she received another phone call to go and see the Human Resource Manager and that when she went, she was given a seven days' suspension letter dated December 14, 2016.
  - c. that on December 20, 2016, being the 6<sup>th</sup> day of her suspension, the Claimant received another phone call to go and meet the Respondent's Human Resource Manager and that when she went, she was given a termination letter dated December 20, 2016. That there was no disciplinary hearing before the second termination.
  - d. that the Claimant was entitled to three months' notice, and that her termination dues were not paid.
11. There being no attendance on the part of the Respondent, the Respondent's case was closed by the Court and directions were given that parties do file written submissions. The case was fixed for mention on November 22, 2022 to fix a judgment date.
  12. On November 22, 2022, Counsel for the Respondent informed the Court that he was not in a position to proceed with the Respondent's case as the Respondent had been placed under receivership by the Court of Appeal. Counsel promised to place on this Court's record the Court of Appeal's decision placing the Respondent under receivership and notice appointing a receiver. This was, however, never done despite Counsel having been given time on November 22, 2022 and January 18, 2023 to place the said documents on record. On February 27, 2023, the Court fixed the suit herein for judgment.
  13. As already stated in this judgment, the Respondent did not call any evidence in substantiation of its pleadings filed herein, and in the absence of evidence by the Respondent, the same are mere unsubstantiated statements of fact; and the evidence adduced by the Claimant in proof of her claim stands both uncontroverted and un rebutted. It was stated as follows in *Trust Bank Limited -vs- Paramount Universal Bank Limited & 2 Others*, Nairobi [milimani] Hccc No. 1243 Of 2021:

“it is trite where a party fails to call evidence in support of his case, that party's pleadings remain mere statements of fact. In so doing, the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.”
  14. It was also held as follows in *Christpine Otieno Caleb -vs- Attorney General* [2014] eKLR:-

“Although the defendant has denied liability, in an amended defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1<sup>st</sup> plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence and counter-claim are unsubstantiated. In the circumstances, the counter-claim must fail.”
  15. Having considered the pleadings filed and evidence adduced by the Claimant, issues that present for determination, in my view, are as follows:-
    - a. whether termination of the Claimant's employment by the Respondent was unfair.
    - b. whether the Claimant is entitled to the reliefs sought.



16. On the first issue, it was stated as follows in Walter Ogal Anuro -vs- Teachers Service Commission [2013] eKLR:-

“...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 in effecting the termination.”

17. Section 41 of the Employment Act provides a mandatory procedure that must be followed by any employer contemplating termination of an employee’s employment for misconduct, poor performance or physical incapacity. Failure to comply with the procedure set out in the said Section renders termination of an employment contract unfair. Further, a termination of employment is rendered unfair if an employer is not shown to have acted in accordance with justice and equity in terminating an employee’s employment. This is by dint of Section 45(4) (b) of the Employment Act.

18. In the present case, the Claimant pleaded and testified that her employment was terminated twice, vide letters dated December 6, 2016 and December 20, 2016 respectively, and that on 14/12/2016 when a meeting took place, she had not been informed of her rights under Section 41 of the Employment Act and had therefore not been accompanied by a witness. The termination that was effected vide the termination letter dated December 6, 2016 was not shown to have been preceded by compliance by the Respondent with Section 41 of the Employment Act which provides as follows:-

“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

19. Further, the termination effected vide the termination of employment letter dated December 6, 2016 is not shown to have been revoked by the Respondent and the Claimant reinstated back to employment before the Respondent purported to engage in flawed purported disciplinary proceedings against the Claimant. I say flawed because:-

- a. there cannot be disciplinary proceedings by an employer against an employee whose employment has already been terminated.
- b. an employee cannot be subjected to disciplinary proceedings on the basis of allegations that have not been formally communicated to the employee by the employer and the employee given adequate opportunity to formally respond to the accusations/allegations.
- c. an employee must be given adequate formal invitation/notice to attend any scheduled disciplinary hearing, and must be informed of his or her right to be accompanied to the hearing by either a fellow employee or a union official where the employee is unionized.



- d. the employee's representations and those of his or her witness must be considered by the employer in determining whether or not to terminate the employee's employment.
20. Any procedure that falls short of the foregoing breaches both the statute and the rules of natural justice, and is unfair.
21. Further, a termination of employment is unfair if an employer fails to demonstrate that the termination was based on a fair and a valid reason. In the present case, it was not demonstrated that termination of the Claimant's employment was on the basis of a fair and valid reason. Section 45(1) & (2) provides:-
- “(1) No employer shall terminate the employment of an employee unfairly.
- (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.”
22. I find and hold that termination of the Claimant's employment by the Respondent was procedurally and substantively unfair, and I so declare.
23. Before considering the second issue, it is imperative to first establish the Claimant's gross monthly salary as at the time of termination of her employment on December 6, 2016. The Claimant pleaded that she earned a consolidated salary of ksh 40,250 per month. She produced in evidence her payslip for the month of October 2016 which shows that she earned a gross salary of ksh 40,250, made up of ksh 35,000 basic salary and ksh 5,250 house allowance. The evidence was neither controverted nor rebutted by the Respondent.
24. Having already made a finding that termination of the Claimant's employment was unfair, I award the Claimant the equivalent of nine months' salary being compensation for unfair termination of employment. That is ksh 40,250 X 9 = ksh 362,250. This is after taking into account the circumstances in which the Claimant's employment was terminated.
25. The claim for three months' salary in lieu of notice is declined as the Claimant did not produce the contract document to demonstrate the basis of such entitlement, and instead the Claimant is awarded ksh. 40,250 being one month salary in lieu of notice pursuant to Section 35(1) (c) of the *Employment Act*. The claim for ksh. 17,442 being salary for thirteen days worked in the month of December 2016 is declined as the Claimant's employment is shown to have been terminated vide a termination letter dated 6/12/2016. Instead, the Claimant is awarded ksh. 6,708 being salary for five days worked during the month of December 2016.
26. The claim for ksh. 56,350 being payment for 42 outstanding/untaken leave days is allowed. Section 74(f) of the *Employment Act* obligates an employer to keep records of employees' annual leave entitlements, days taken and days due. The Respondent did not discharge that obligation by producing in Court such records and tendering evidence thereon. The claim for issuance of a certificate of service is allowed; as an employee is entitled to issuance of a certificate of service upon termination of employment. That is the creed of Section 51(1) of the *Employment Act*.
27. Finally, and upon considering written submissions filed by the Claimant, judgment is hereby entered for the Claimant against the Respondent as follows:-



- a. a compensation for unfair termination of employment .....ksh 362,250.
  - b. one month salary in lieu of notice.....ksh 40,250
  - c. salary for five days worked in December 2016.....ksh 6,708
  - d. payment for untaken/outstanding leave days.....ksh 56,350 Total ksh 465,558
28. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the [Employment Act](#).
29. The Respondent shall, within thirty days from the date of this judgment, issue the Claimant with a certificate of service pursuant to Section 51 of the [Employment Act](#).
30. The Claimant is awarded costs of the suit and interest at court rates.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 25<sup>TH</sup> MAY 2023**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

Appearance:

Mr. Furaha for Claimant

Mr. Musyoki for Respondent

