



**Kamau v Nairobi Enterprises Limited (Cause 864 of 2019)  
[2023] KEELRC 1162 (KLR) (16 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1162 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 864 OF 2019  
NJ ABUODHA, J  
MAY 16, 2023**

**BETWEEN**

**ALBERT MACHARIA KAMAU ..... CLAIMANT**

**AND**

**NAIROBI ENTERPRISES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this suit against the Respondent Company for the unfair and unlawful termination of his employment.
2. In his Memorandum of Claim, the Claimant pleaded that the Respondent employed him as a Medical Engineering Technician in 2003. That he was promoted to a Biomedical Engineer in 2010 and offered an employment contract dated May 18, 2015 confirming him in the said position, which he held until November 12, 2018 when he was summarily dismissed from employment.
3. The Claimant averred that as per the Contract of Employment, he was entitled to a gross salary of Kshs 140,000/= per month among other payments. That his salary had severally been reviewed and as at the time of termination, he was earning a monthly gross salary of Kshs 190,300/=.
4. According to the Claimant, when he reported to work as usual on the said November 12, 2018, the Company's Director, Mr Raju Dhanani asked him to handover the Company's car keys and to immediately leave the premises. That no explanation was given to him whatsoever and instead, the Director shouted and abused him in Hindi language.
5. It is the Claimant's case that the said Director called him two weeks later telling him that he had been informed that the Claimant was doing work for other people. He denied the allegation and informed the Director that he had never done any work for anybody else during his official working hours.



6. The Claimant further averred that he has not been paid any terminal dues by the Respondent to date. The terminal dues include one month salary in lieu of termination notice, salary for days worked in November 2018 (whereas the Respondent had remitted his PAYE for the 12 days worked in November 2018), 21 pending leave days, gratuity from the year 2009, and commission for the year 2018.
7. He further pleaded that after the intervention of his Advocate, the Respondent issued him with a backdated termination letter on September 30, 2019 through its Advocate. That this letter was needed by Barclays Life Assurance Kenya Limited that had insured a loan he had with Barclays Bank of Kenya and covered events such as termination of employment.
8. It was the Claimant's averment that the Respondent prevented him from taking his personal working tools that were in the Company vehicle he was using and whose total costs is Kshs 230,300/=.
9. The Claimant further averred that the Respondent had declined to issue him with a letter to present to the Pension Scheme run by it, for his savings amounting to Kshs 1,248,466.00 to be given to him. That the Pension Scheme also informed him that the Respondent had instructed it not to pay him any money.
10. The Claimant's position was that the conduct of the Respondent as regards the said termination was unconstitutional, unlawful, unfair arbitrary and contrary to the rules of natural justice because: it was without any or any valid reasons; no explanation was given to him on the allegations against him prior to the termination; the Respondent did not accord him fair hearing and fair labour practices before termination; and the decision to terminate his services was pre-determined.
11. The Claimant therefore sought from Court for a declaration that the Respondent unfairly and unlawfully terminated his employment. He further asks for compensation at 12 months' salary and payment of his unpaid terminal dues, the value of his withheld tools and his pension. For the pension, he seeks in the alternative an order directing Kenindia Insurance Company Limited to pay him the said pension savings. The Claimant also seeks issuance of a certificate of service, costs of the suit, and interest until payment in full.
12. In its Memorandum of Defence, the Respondent pleaded that it only dismissed the Claimant for gross misconduct after he repeatedly refused and or ignored to appear for various disciplinary meetings, despite being given notice.
13. According to the Respondent, the Claimant breached the terms and conditions of his contract of employment by secretly setting up and running a business that was in competition with that of the Respondent company. In addition, that the Claimant had further incorporated or caused to be incorporated, a company named Medquip Limited, which directly dealt with the Respondent's clients. That the Claimant thus deprived the Respondent of its valuable time for which he was being paid, to the detriment of the Respondent.
14. The Respondent averred that there is evidence the Claimant worked for other people including its clients during office hours. That the Claimant was warned both verbally and expressly through various notices which he ignored and continued using the company car, finances and office hours to conduct competing business. That it can be inferred from the Claimant's averment in paragraph 8 of the Statement of the Claim that he does not deny having engaged in competing business against that of his employer.
15. It pleaded that all dues owed to the Claimant were paid to him. Additionally, that the Claimant is not entitled to gratuity because the Respondent has a pension scheme for its employees to which it contributes and whose proceeds the employees are entitled to after presenting a termination letter to



- the insurance company. According to the Respondent, the Claimant refused to collect his termination letter which was always ready but he instead chose to contact it through his lawyers for the same. It denied ordering the insurance company not to release the Claimant's dues as alleged.
16. The Respondent further averred that in line with its policy, it provided the Claimant with all necessary work tools at all times. That the allegations that it seized and refused the Claimant to retrieve his personal tools from the company car are baseless. Furthermore, that the Claimant was not entitled to any bonus that was in any case given at its discretion.
  17. It further pleaded that the Claimant presented to it forged receipts for items allegedly bought and could not account for a sum of Kshs 257,000.00 he took from the company as imprest. It averred that this was the reason it withheld the Claimant's salary when he could not account for the same.
  18. The Respondent asserted that it followed the law and relevant procedure in terminating the Claimant's employment and was very patient with him. That the demand letter served upon it was thus not merited and incapable of compliance.
  19. The Claimant's reply to the Respondent's Defence was that he never engaged in competing business using the Respondent's car and finances and neither did the Respondent warn him nor issue him with any notices on the same. His position was that the Respondent only issued him his termination letter after he instituted this suit and he presented the said letter to the insurance company. Further, that he was entitled to bonus as the Respondent had been paying the same to him.
  20. At the hearing, the Claimant testified that the Respondent is the one who assisted him in registering the business and said he would give him small businesses from time to time.
  21. It was his evidence that December holidays were computed as leave and that it was the company's policy to pay gratuity at one month's salary per year. He told the Court that he had produced receipts for the personal tools he used to do the Respondent's work and that he was never issued with any tools. Furthermore, that he accounted for all the imprest and was never issued with a show cause letter or warning letter for the Kshs 200,000/=.
  22. In cross-examination, the Claimant stated that he registered the company while still working for the Respondent. He however denied that he did business using the company while still working with the Respondent. He asserted that the Respondent gave him money to register the company and stated that the quotations from Medquip were not authored by him.
  23. The Claimant confirmed having gotten his pension. Concerning commissions, he admitted that the same was not provided for in his contract and that it was at the discretion of the employer. He however changed his statement in re-examination asserting that it was company policy to pay commissions and that he had produced evidence of payment of the same.
  24. The Respondent's witness, Rajan Dhanani (RW1), testified that on November 20, 2018 he received information that the Claimant had been doing business with his clients. That at around 11.00 am, the Claimant went to him with vouchers claiming money for work done. That when he confronted him, he denied doing business and refused to offer an explanation in writing.
  25. RW1 further testified that two weeks after dismissing him, the Claimant went back to ask if he could work for him as a consultant, but he declined the request. He asserted that he gave the Claimant tools for work.
  26. In cross-examination, RW1 stated that the unsigned quotations before Court, which he got from MP Shah, was evidence of competition. He denied that he asked the Claimant to register the company and confirmed having not paid the Claimant his terminal dues. He also denied paying the Claimant



gratuity, stating that the alleged payment must have been for a purchase. He asserted that payment of commission was not a policy and was not paid regularly. According to RW1, the Claimant had not collected his certificate of service.

### **Claimant's Submissions**

27. The Claimant submitted that an employer must comply with sections 41 and 43 of the *Employment Act, 2007* for a termination to be both procedural and substantively fair. That this position was reiterated by the Court in the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR.
28. He submitted that however the evidence before Court is that the Respondent did not comply with procedural fairness as under section 41 of the *Employment Act* before terminating his employment contract. This is more so because the Claimant's representations were not considered before termination and he was not informed of his right to be accompanied by a fellow employee to a disciplinary hearing.
29. On substantive fairness, the Claimant submitted that a fair and valid reason is the reason the employer genuinely believed existed at the time of termination, and which caused the employer to terminate the services of the employee. However, no evidence was produced to support the accusation that he was engaged in a business similar to the Respondent's. That the quotation produced in Court was unsigned and RW1 could not explain when he received the same.
30. It was the Claimant's submission that he has proved his case on a balance of probability that there was no substantive fairness before he was terminated from employment. He prayed for Court to be guided by the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR in which the Court held that before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity.
31. He submitted that the Respondent on the other hand has failed to prove that it fairly and validly terminated his employment, which therefore entitles him to 12 months compensation of unfair termination.
32. The Claimant further submitted that he is entitled to one month salary in lieu of termination notice pursuant to sections 35 and 36 of the *Employment Act*. For the 12 days worked in November, that section 49(1) (b) of the *Employment Act* provides that where summary dismissal or termination of a contract is unjustified, an employee may be paid:
  - (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked.
33. The Claimant submitted that he is entitled to his claim for outstanding leave days for 2018 pursuant to section 28 of the *Employment Act*.
34. Having produced receipts for the tools he bought and which were retained by the Respondent, he submitted that he is entitled to the value of the same.
35. On the claim for commission, the Claimant submitted that no document was produced before this Honourable Court to prove that commission was paid at the discretion of the Company. He submitted that it is the employer's duty to keep records as provided under section 74 of the *Employment Act* and



he is thus entitled to his commission for 2018. He relied on the case of *Lydiab Mongina Mokaya v St Leonard's Maternity Nursing Home Limited* [2018] eKLR in which the Court held that:

“It is the onus of the employer to keep records of employment. Whereas the claimant's case is pegged on the fact that the contract of employment was unwritten, the respondent does not address this or offer any evidence to the contrary. This is the hallmark of section 10 of the Employment Act, 2007.”

### **Respondent's Submissions**

36. The Respondent submitted that the Claimant was terminated summarily for gross misconduct and not unfairly as claimed by him. That section 44(4) of the *Employment Act* provides for matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause. The Respondent relied on the authority of *Thomas Sila Nzivo v Bamburi Cement Limited* [2014] eKLR where the court in amplification of the import of section 44(4) (g) observed as follows:

“The Respondent had reasonable and sufficient grounds to suspect the Claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summarily dismissing the Claimant under Section 44 [4] [g] of the Employment Act 2007. The Employer was not required to have conclusive proof of the Claimant's involvement; it was only expected to have reasonable and sufficient grounds.”

37. It further relied on the Court of Appeal decision in *Kenya Revenue Authority v Maginga Salim Murgani* [2010] eKLR, wherein the court noted that the fairness of a hearing is not determined solely by its oral nature and may be conducted through an exchange of letters, as had happened in the matter, and were satisfied it was a fair hearing.

38. The Respondent submitted that Claimant is not entitled to the reliefs sought since his amounted to gross misconduct and his summary dismissal was as such in accordance with section 44(4) (f) and (g) of the *Employment Act*. That having lost on a case of unlawful termination of employment, the Claimant becomes disentitled to the reliefs sought.

39. It was the Respondent's submission that costs should follow the event.

### **Determination**

40. Section 43(1) of the *Employment Act* provides:

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

41. Subsection (2) provides

“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.”

42. It was not contested by the claimant that he conducted a business in competition with that of his employer. He justified the same by saying it was the respondent's director who encouraged him to register the business and even gave him money for registration. The claimant however produced no evidence to support these assertions. Employment is a position of trust and it is incredible that the



respondent would allow the claimant to register a business in competition with it. If indeed this was true, the claimant ought to have produced independent evidence to confirm this and not leave such a serious matter to mere assertion. The Court does not believe him.

43. Concerning hearing before termination, whereas section 41(1) of the Act requires that an employee be heard before termination is done, there is no requirement that such a hearing must be by a formal session where people must sit down and witnesses called. Circumstances of the parties and how they have been conducting their affairs usually dictates the format such a hearing ought to take. As was submitted by the respondent, the Court of Appeal in the case of *KRA v Menyinya Salim Murgani* [2010] eKLR correctly observed that the fairness of hearing is not determined solely by its oral nature and may be conducted through exchange of letters. If I may add through active interaction of the employer and employee over an issue the employee has not denied or failed in the circumstances to rebut by offering credible evidence to the contrary.
44. The claimant alleged that on the material day he was abruptly called by the Director and told to hand over the company's car keys and leave. He was later called after two weeks by the Director who demanded to know why he was working for other people. The claimant did not deny that he was the proprietor of a company known as Medquip. The company who sent invoices to MP Shah (one of the respondent's clients). This was an obvious case of conflict of interest. As observed earlier the claimant never adduced any credible independent evidence to support the allegation that the respondent allowed him to register a parallel company.
45. From the above observations what purpose would a formal hearing serve when the reason for which the claimant was to be dismissed was clear to him and he failed to offer any evidence to support that allegation that the respondent's director allowed him to register a rival business and even gave him money to register the same.
46. The Court is therefore persuaded that there existed valid reasons for dismissing the claimant and that the dismissal did not violate any procedural fairness since the matter for which he was dismissed was live in his mind and he admitted being involved save for that he tried to justify the same as being with the knowledge of the respondent.
47. The claim is therefore found without merit and is hereby dismissed with costs.
48. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16<sup>TH</sup> DAY OF MAY 2023**

**ABUODHA J. N.**

**JUDGE**

**In the presence of:-**

**Mr. Kogai for the Claimant**

**Mr. Lebor for the Respondent**

