



**Kerubo v Great Wall Enterprises Limited (Cause 802 of 2018)
[2023] KEELRC 1160 (KLR) (15 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1160 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 802 OF 2018
NJ ABUODHA, J
MAY 15, 2023**

BETWEEN

MERLYN MARAGYA KERUBO CLAIMANT

AND

GREAT WALL ENTERPRISES LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed this claim against the Respondent for wrongful dismissal, unfair termination and seeking remedies for the same.
2. It was the Claimant's case that the Respondent employed him as a Sales Person by a contract dated September 12, 2012, earning a monthly gross salary of Kshs 19,000/=. She undertook her job dutifully and diligently and was never subjected to any disciplinary proceedings during the period of the contract.
3. She however averred that the Respondent unlawfully terminated her employment on January 20, 2018 without warning, notification or justification. That since she was not accorded an opportunity to be heard before being sent away, she was condemned unheard. That the Respondent failed to consider that she had a family dependent on her and financial obligations.
4. She further averred that it was an express term of her contract of employment that the respondent would give her at least one month's notice of termination of employment and a Certificate of Service. That she suffered loss and damage when the Respondent failed to issue her with the said notice and certificate. That she was also entitled to fair and just treatment by the Respondent considering her position that she held for about 5 years and her age.
5. The Claimant averred that she is therefore entitled to aggravated and punitive damages for the wrongful loss of employment. She further sought damages at 12 months' pay, severance pay, unpaid leave days, certificate of service, and debt collection fee.



6. The Claimant in the statement of claim listed the following prayers:
 - a. A declaration that Claimant's dismissal from the Respondent's employ was unprocedural, unfair and unlawful and unconstitutional.
 - b. Damages as particularized in Paragraph 16 above.
 - c. Certificate of service.
 - d. A fine of Kshs 100,000 against the respondent for failure to comply with mandatory provision of section 51(3) of the [Employment Act, 2007](#).
 - e. Interests on (b) above from the date of filing the suit.
 - f. Costs of this suit.
 - g. Any other relief that the court may deem appropriate to grant.
7. In reply, the Respondent averred that it employed the Respondent on a one-year renewable contract. That the Claimant had on several occasions demonstrated grave insubordination and refusal to comply with instructions given to her, which conduct culminated in issuance of a Warning Letter dated March 12, 2016.
8. The Respondent's case was that it terminated the Claimant's employment summarily pursuant to the provisions of section 44(g) of the [Employment Act 2007](#) owing to her connivance with unscrupulous middlemen to swindle the Respondent through fictitious client referrals. That the Claimant violated the company's policy, breached the terms of her contract of employment and caused the Respondent massive loss of profits. That this being a summary dismissal, the Claimant was not entitled to notice.
9. It pleaded that it further accorded her a proper hearing in a meeting organised and chaired by the Respondent's Human Resource Manager. That the Claimant has also never requested and/or collected her Certificate of Service which is ready for collection.
10. According to the Respondent, the Claimant was treated fairly and justly and is not entitled to any damages and reliefs sought. It prayed for the suit to be struck out and dismissed with costs.
11. In her testimony before Court, the Claimant stated that she was told she had been terminated on account of stealing. She denied having been subjected to a disciplinary hearing and sought compensation as prayed in the Statement of Claim.
12. In cross-examination, the Claimant stated that she was issued with a dismissal letter which she signed for but the same was not among her documents in court. She admitted that she had not produced a document to show that she had applied for leave and it was declined. She further stated that her gross salary had deductions such as NSSF, Tax and NHIF.
13. The Respondent's witness, Li Qi (RW1), testified that the Claimant was engaged by the Respondent from 2012 to 2018 and that she was terminated because of adjusting prices to customers and pocketing the money. RW1 asserted that the Claimant was given the reason for her termination and she signed the dismissal letter.
14. In cross-examination, RW1 agreed that they had not filed any disciplinary proceedings in court and that they had no statement from witnesses showing the Claimant adjusted prices.



Claimant's Submissions

15. The Claimant submitted that section 47(5) of the [Employment Act](#) imposes the burden of proof of unfair termination on the employee and once the employee's burden is discharged, it imposes an equal burden on the employer to prove that the grounds for termination of employment indeed existed and was lawful. Further, section 43 of the [Employment Act](#) imposes the burden of proof of reasons for termination of employment on an employer, failure to which the termination of employment is deemed unlawful.
16. She submitted that where no notice of termination of employment is issued, the law presupposes under section 44(1) of the [Employment Act](#) that the same amounts to summary dismissal. Subsection 4 thereof gives the grounds under which an employee can be summarily dismissed from employment.
17. According to the Claimant, the instant case falls short of the requirements under section 44(4) of the [Employment Act](#). That since no reasons were advanced to her, the termination of her employment by the Respondent was unlawful within the meaning of section 43 of the Act.
18. The Claimant submitted that she had demonstrated that the Respondent unlawfully terminated her employment and she is hence entitled to the reliefs sought. She relied on the Court of Appeal decision in the case of [New Kenya Cooperative Creameries v Olga Auma Adede](#) [2019] eKLR.
19. It was the Claimant's submission that the contract being a monthly payment employment, she is entitled to one month pay in lieu of notice as provided for under section 36 of the Act. She relied on the case of [Joshua Rodney Marimba v Kenya Revenue Authority](#) [2019] eKLR.
20. Furthermore, that since she was never granted leave from employment as stipulated in law, she is entitled to the leave days accrued and not utilized. That she was also never granted house allowance that is payable as a percentage of the basic salary and is hence entitled to the same. Third, that section 35(5) of the Act entitles her to service pay for every year worked. Lastly, given the duration she worked, she is entitled to an amount equal to 12 months' pay as compensation for unfair termination. On issuance of a certificate of service, she refers the Court to the authority of [Angela Wokabi v Tribe Hotel Limited](#) [2016] eKLR to wit, an employer's wilful refusal to issue a certificate of service attracts penal consequences including a fine.

Respondent's Submissions

21. The Respondent submitted that it has discharged its burden of proving that the termination of the Claimant was fair and rightful and that the Claimant bears the burden of proving the claim that her termination was unfair and wrongful. It referred the Court to the case of [Rudolf Sbitandi Daraja v Zablon Juma Atulo t/a ZJ Atulo & Company Advocates](#) [2016] eKLR wherein the Court stated as follows:

“It is trite law that he who pleads must prove. Section 107 of the Evidence Act specifically provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. It is also a rule of evidence that in civil matters the standard of proof is on a balance of probability. Section 47(5) of the Employment Act provides that for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination or wrongful dismissal has occurred shall rest in the employee, while the burden of justifying



the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

22. It submitted that Section 44(g) of the *Employment Act* provides that “gross misconduct” that “justify the summary dismissal of an employee for lawful cause” includes when “an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or employer’s property.” It was the Respondent’s position that upon conducting its investigations, it had reasonable and sufficient grounds to suspect that the Claimant had made dishonest price adjustment in her sales to the substantial detriment of its property.
23. Further, it has discharged its burden of proof on a balance of probability. On this submission, it relied on the Court of Appeal’s decision in *Kenya Revenue Authority v Reuwel Waitbaka Gitabi & 2 others* [2019] eKLR, which affirmed that the standard of proof is on a balance of probability and not beyond reasonable doubt, and that all the employer is required to prove are the reasons that it “genuinely believed to exist,” and caused it to terminate the employee’s services.
24. The Respondent submitted that the Claimant had however been dishonest and inconsistent in her pleadings by stating in her Statement that she was never subjected to any disciplinary proceedings, but thereafter admitting in her Submissions that she received a Warning Letter in 2016. He asserts that dishonesty and misrepresentation in pleadings and testimony before the Court should be penalised since it creates inferences of the general untruthfulness of the Claimant. It further submitted that the Claimant was granted an opportunity to explain herself and respond to the accusations against her but failed to provide any justifiable or sufficient reason for her dishonesty at work.
25. On the remedies sought in her claim, the Respondent submitted that the Claimant is not entitled to damages and payment in lieu of notice, which are remedies under section 49 of the *Employment Act*, in light of its submissions that her summary dismissal was justifiable because of her gross misconduct. In any event, damages and payment in lieu of notice is discretionary in nature and fairness requires that the Court takes into consideration the conduct of the Claimant (Supreme Court finding in *Kenfreight (EA) Limited v Benson K Nguti* [2019] eKLR was relied on).
26. Regarding the other remedies, the Respondent submitted that the Claimant is not entitled to severance pay as the termination was not a redundancy. It refers to the finding in the case of *Hassanath Wanjiku v Vanela House of Coffees* [2018] eKLR in which the Court affirmed that the Claimant was not entitled to severance pay as she was not declared redundant. Furthermore, that the Claimant is not entitled to service pay by virtue of section 35(6)(d) of the *Employment Act* as the Respondent made contributions for her to the NSSF and she also admitted to the same in her cross-examination. It further submitted that the approved Leave Request Letter and admissions by the Claimant during cross examination substantiates its averment that it used to grant her leave. For the prayer for debt collection fees, it submitted that the Claimant lacks the legal basis for the grant of such relief. That since she never pleaded and provided particulars for house allowance that she belatedly sought to pursue in her submissions, this Court should decline to grant the claim. That this Court lacks the capacity to fine the Respondent as this case is not a criminal proceeding (*Moses Ngumo v East African Breweries Limited* [2019] eKLR). Lastly, it calls upon this Court to consider the gross misconduct of the Claimant that resulted in her summary dismissal in declining to grant her costs of the suit.
27. In a claim for unfair termination the burden of proof that an unfair termination has occurred is on the employee while the burden of proof of the reasons for termination is on the employer. The *Employment Act* further requires that before an employee is dismissed from service the employer must accord such an employee a chance to respond or explain the reasons for which his or her termination is being considered.



28. The claimant herein was accused of adjusting prices to customers and pocketing the money. No evidence was however tendered by the respondent of any incidence of inflated price or complaint by a particular customer to vouch for the accusation. Further the respondent did not produce any evidence that the claimant was taken through any disciplinary hearing. All that was said was that the claimant was issued with a summary dismissal letter stating reasons for her dismissal.
29. Section 10 of the Employment Act requires an employer to issue an employee with a letter of appointment setting out particulars of employment. The Act further states under subsection (7) that in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. The claimant herein alleged that she was employed by the respondent but the contract of engagement was retained by the employer with no copies to her and her colleagues. It was incumbent upon the respondent therefore to produce the contract and dispute the terms the claimant was alleging were contained therein.
30. From the foregoing the respondent has failed to discharge the burden cast upon it by law with the result that the Court finds and holds that the claimant was unfairly terminated from employment. On the quantum of compensation under section 49, the Court noted that the by the time of termination the claimant had worked for the respondent for about six years. She stated that she was hired as a sales lady but did not produce any credentials or academic papers to show that she was skilled and trained in sales. Bearing the foregoing in mind, the Court is of the view that an award of six months' salary as compensation for unfair termination would be adequate.
31. In conclusion the Court awards the claimant as follows:
- a. One month's salary in lieu of notice Kshs 19,000
 - b. Unpaid leave Kshs 38,000
 - c. Six months' salary as compensation for unfair termination Kshs 114,000
Total Kshs 171,000
 - d. The claimant shall further have costs of the suit and interest thereon.
 - e. This award shall be subject to taxes and statutory deductions.
 - f. The respondent to issue the Claimant with a certificate of service.
32. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF MAY 2023

ABUODHA J. N.

Judge

In the presence of:-

No appearance for the Claimant

Kabau for the Respondents

