



**Gachanja v Kazuri 2000 Limited (Employment and Labour Relations Cause 1172 of 2018) [2023] KEELRC 1189 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1189 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1172 OF 2018**

**AN MWAURE, J**

**MAY 12, 2023**

**BETWEEN**

**STEPHEN MWANGI GACHANJA ..... CLAIMANT**

**AND**

**KAZURI 2000 LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed a memorandum of claim dated 6<sup>th</sup> July 2018 and prays that a declaration be made that termination of claimant by the respondent was evil and malice among others.

**Claimant's case**

2. Claimant says he was employed by the respondent as a security guard in 2000 and was guarding a house of the director's respondent.
3. He says his employment was terminated unlawfully by a letter dated 18<sup>th</sup> April 2017 and at that time he was earning a salary of kshs 15,522/-.
4. He says he was only paid kshs 29,034/- as the final dues. He also claims for house allowance and overtime and public holidays.
5. He further says he was terminated for refusing to sign a contract which was given to him many years since he started working for the respondent. The contract was like for a new employee. He says that the employees requested their contracts to be backdated but the same was not done. He says they wrote to the respondent several times but they never responded but instead sent him a warning letter for failing to return the written contract.
6. The claimant says he served the respondent with diligence till he was terminated on 18<sup>th</sup> April 2017.



7. So the claimant prays for a declaration that his termination was unfair and discriminatory among others and so he should be paid salary up to his retirement age amounting to kshs 1,944,000/-. He also prays for unpaid overtime and house allowance and unpaid leave. He prays for interest and costs of the suit.

### **Respondent's case**

8. Defence statement is dated 9<sup>th</sup> May and respondent admits claimant worked for the respondent for one year contract renewable from time to time. The respondent avers that in 2016 the respondent resolved to renew the claimant's contract but the claimant declined to accept and execute the employment contract. On 10<sup>th</sup> April 2017 a warning letter was issued to the claimant and he continued to be adamant not to sign the letter and so was summarily dismissed on 18<sup>th</sup> April 2017 for gross misconduct.
9. The respondent says the claimant was paid his terminal dues of kshs 29,034/-. The respondent says the service pay, salary and allowances were all paid for the years proceedings 2017. The respondent denies the claimant had any outstanding dues for overtime.
10. Claimant says the salary paid to the claimant was inclusive house allowance. The respondent denies the claimant is entitled to compensatory damages and concludes the claim for illegal and unfair dismissal is unfounded in law and facts and should be dismissed with costs.

### **Claimant's evidence in court**

11. The claimant in his evidence in court states he was terminated for refusing to sign a one year contract while he has worked for the respondent for 16 years. He refused to sign the contract as he wanted his past accrued benefits be addressed but the respondent did not address the same.
12. He says he was accused of being arrogant and was summarily dismissed. He says his overtime was not paid and nor was he paid house allowance.

### **Respondent's evidence**

13. The respondent admits claimant had worked for them for between 14-15 years. He says in 2016 the claimant refused to sign a contract and kept the contract for about one year. He says that claimant claimed he would lose his benefits. He said they wanted to continue engaging the claimant and once he refused to sign the said document they knew he did not want to engage and he just left.
14. The respondent says claimant had no pending overtime and his house allowance was paid.
15. The court considers the submissions by the claimant dated 6<sup>th</sup> December 2022 and the cited authorities.
16. Respondent submissions dated 24<sup>th</sup> day of January 2023 were also considered by the honourable court.

### **Analysis and Determination**

17. The court will endeavour to consider if the claimant was unlawfully and wrongfully terminated by the respondent. Secondly the court will consider if claimant is entitled to the reliefs prayed.
18. The reason for the termination of the claimant as per the letter by the respondent dated 18<sup>th</sup> April 2017 was refusal to sign a contract letter dated 30<sup>th</sup> April 2016 and the respondent stated in the letter that the refusal amounted to gross misconduct and so claimant was summarily dismissed from employment.
19. The claimant in his evidence in chief says he declined to sign the contract as he had worked for the respondent from 2000 and was being asked to sign a contract commencing 2016 as though it was a new contract and he was apprehensive he would lose his benefits.



20. He says he attempted to discuss and agree on the terms of the contract but respondents were not willing to discuss with him and gave him two months to consider the same and after he gave a revised copy the respondent still did not agree with him.
21. The claimants and other employees wrote to the respondent as early as 2011 asking for an appointment to discuss their contracts but were not given a positive response.
22. The respondent were changing the terms of employment of the claimant from permanent to a fixed term and it was only reasonable to give him opportunity to voice his concerns and come up with an acceptable document. Section 10(5) of *Employment Act* provides that in order to change the terms of an employee there has to be consultations with the employee and is not therefore fair labour practice to terminate an employee without consultation because of refusing to sign a new contract without such consultation.
23. Under the circumstances the twin test of termination of an employee is that substantive test where the employer must give a valid reason in terminating an employee and also to follow the procedure. Section 45(1) of the *Employment Act* 2007 provides as follows: “no employer shall terminate the employment of an employee unfairly.”
24. The court finds the respondent was erroneous in terminating the claimant for his reluctance to sign a contract which had been written without his consultation.
25. Further the claimant was not given a hearing as provided in mandatory terms in section 41 of the *Employment Act*. Section 41 provides as follows.  
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.
26. Clearly the respondent failed in terminating the claimant without giving him a hearing.
27. In the case of *Principal and BOG Machakos Teachers College vs Wambua Muwane* (2016) eKLR cited by the claimant the court had this to say on unfair and wrongful termination:

“The law on the first issue before this Court is that a dismissal of employment can be unlawful for reasons of being a wrongful dismissal or an unfair dismissal. The law provides that a dismissal will be wrongful if it is in breach of the terms of the employment contract as held in *Imenje vs Kenya National Co. Ltd* (1986) eKLR 350. The circumstances which can give rise to a claim of wrongful dismissal are explained in more detail in Tolley’s Employment Handbook, 20th Edition paragraph 58.1 at page 1093 as follows:

“A wrongful dismissal occurs when an employer dismisses an employee in a way that is in breach of an employee’s contract of employment. Most commonly this arises when the employer dismisses the employee summarily (i.e without any notice at all) or with short notice, and has no sufficient justification for doing so. However there may also be a wrongful dismissal in other situations: for example if the employer terminates the employment without following some procedure prescribed by contract. Further, if the employee resigns in response to some repudiatory breach of contract by the employer that will give rise to a claim which is in effect for wrongful dismissal.”



An unfair dismissal is one on the other hand one where there is no substantive justification provided or procedural fairness observed. The elements of a claim for unfair dismissal are explained in Tolley's Employment Handbook, 20th Edition at paragraph 53.1 at page 984 as follows:

“An employer who dismisses an employee without good reason or without following a fair procedure lays itself open to a claim for unfair dismissal. When such a claim is brought, the employer has to establish the reason for dismissal...if the dismissal is found to be unfair the employer can be ordered to re-engage, reinstate or to pay compensation to the ex – employees”

A dismissal can therefore be both unfair and wrongful at the same time.

28. In the case of *Mary Chemweno Kiptui vs Kenya Pipeline Company Limited* Cause No 435 of 2013. The court held that termination of an employee is a penalty with serious consequences that must be done with utmost regard and notice to the affected employee who should be granted reasonable opportunity to give a defence.
29. Flowing from the above the court has come to the conclusion that the claimant's termination was unfair and unjust and so is entitled to certain of the reliefs prayed.

### **Remedies**

30. The prayer for kshs 1,944,000/- for the period up to the end of his contract is not supported neither by facts nor by law and so is declined.
31. The claimant worked for the respondent for a long period of time though not clear from records in court exactly how many years but is definitely over ten years and so is awarded Kshs 15,222x10 = 155220/-. Total award is Kshs 155,220/-.
32. He is also awarded costs and interest at court rates from date of judgment until full payment.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12<sup>TH</sup> DAY OF MAY, 2023.**

**ANNA NGIBUINI MWAURE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**ANNA NGIBUINI MWAURE**



**JUDGE**

