



**Musango v Metro Logistics Limited (Cause 1956 of 2017)
[2023] KEELRC 1124 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1124 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1956 OF 2017**

JK GAKERI, J

MAY 10, 2023

BETWEEN

MESHACK KYALO MUSANGO CLAIMANT

AND

METRO LOGISTICS LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 29th September, 2017 alleging unfair and unlawful termination of employment.
2. The Claimant avers that he was employed by the Respondent in November 2014 as a Security Guard at Kshs.20,000/= per month and in March 2017 he was promoted to a Storekeeper and later to a Security Guard in March 2017 by which time the salary had risen to Kshs.35,000/=.
3. That he performed his duties diligently and loyally. That the redeployment as a Security Guard was a demotion.
4. That an alleged security incident occurred and the Respondent lost an item and the same happened during the day and the Claimant was a night shift and was suspended by word of mouth on 25th April, 2017 to pave way for investigation.
5. That the Security Manager cleared him of wrong doing but the Respondent refused to invite him back to work or issue a dismissal letter.
6. That attempts to reach the Respondent by telephone and text messages were unsuccessful and he was not paid the salary for April 2017.
7. It is the Claimant's case that he was neither given a termination letter nor an opportunity to challenge the decision or be heard as he was not subjected to a disciplinary hearing.



8. The Claimant prays for;
- i. A declaration that termination of employment was unlawful, unprocedural and unjustified.
 - ii. A declaration that the Respondent engaged in discriminatory practices prejudicial to the Claimant.
 - iii. Salary for April 2017 Kshs.35,000/=.
 - iv. One month's salary in lieu of notice KShs.35,000/=.
 - v. 12 months salary Kshs.420,000/=.
 - vi. House Allowance November 2014 to March 2016 at 15% of basic salary Kshs.51,000/=.
 - vii. House Allowance from April 2016 to April 2017 at 15% Kshs.68,250/=.
 - viii. Leave Allowance for 18 months 31.5 days Kshs.24,231/=.
 - ix. Leave Allowance for 12 months 21 days Kshs.28,269/=.
 - x. Service pay for 2 years Kshs.33,871/=.
 - xi. General damages for trauma, humiliation and loss of dignity.
 - xii. Interest on (iii), (iv), (v), (vi), (vii), (viii), (ix) and (x) at court rates from date of filing till payment in full.
 - xiii. Costs of the suit.
 - xiv. Any other remedy that this court may deem fit to grant.

Respondent's case

9. The Respondent filed a response to the Memorandum of Claim on 12th October, 2017. It denies having employed the Claimant in the capacity or job group cited and denies having signed a contract of employment or salary of Kshs.35,000/= in 2014.
10. That the document relied upon by the Claimant did not originate from the Respondent nor drawn or executed by its representative.
11. That the document relied upon is dated 1st April, 2016 yet the Claimant was employed in 2014 and the job description is Empties Clerk yet the states he was a Security Guard and Storekeeper.
12. It is the Respondent's case that the Claimant was employed as a Security Guard and an oil pump was misplaced while he was on duty and was found culpable after investigations were carried out and was subsequently suspended and asked to co-operate with the investigators but did not and was subsequently dismissed from employment.
13. The Respondent avers that the Security Manager's investigation found the Claimant culpable.
14. The Respondent further avers that the Claimant's dismissal was conducted in compliance with the [*Employment Act*, 2007](#).
15. That the Claimant admitted having been aware of the circumstances that led to his dismissal.



16. Finally, the Respondent avers that the Claimant's status at the Respondent's company did not warrant him the benefits claimed.

Claimant's evidence

17. The Claimant's written statement rehashes the contents of the Memorandum of Claim.
18. On cross-examination, the Claimant confirmed that he had an employment contract dated 1st April, 2016 which had not been signed by the employer. That he was employed as Security Guard in 2014 but in March 2016, he was made a Storekeeper and in early March 2017, he resumed duties as a Security Guard.
19. It was his testimony that the initial salary of Kshs.20,000/= rose to Kshs.35,000/= in April 2016.
20. That the theft occurred during the day and he was a night guard and had no evidence that he was cleared by the Security Manager, one Mr. Ernest.
21. That he had no evidence of attempts to contact the employer.
22. The witness confirmed that the salary for April 2017 was paid and his NSSF contributions were being remitted.
23. On re-examination, the Claimant testified that he was neither summoned by the CID or given a termination letter nor invited to a disciplinary hearing.

Respondent's evidence

24. RWI, Vivianne Wafula confirmed on cross-examination that she was in charge of Human Resource.
25. It was her testimony that the Claimant was neither taken through a disciplinary hearing or his case heard.
26. That the theft case was reported to the police for investigations.
27. RWI testified that the Respondent did not conduct any investigations in the matter and the hearing was to be conducted after the police concluded theirs and reported to the Respondent.
28. That the Claimant was unco-operative and did not report to the police when invited by the investigations officer.
29. The witness testified that the Respondent's hands were tied by the police investigation.
30. That the matter was still pending and no evidence had been filed to show that the Claimant had been summoned by the police.

Claimant's submissions

31. The Claimant's counsel submitted on termination of the Claimant's employment and entitlement to the reliefs sought.
32. Counsel submitted that it was common ground that the Claimant was not taken through a disciplinary process and no investigation was carried out.
33. Reliance was made on the provisions of Section 41 of the *Employment Act* on procedure and Section 43 on proof of reason for termination to urge that termination of the Claimant's employment was unfair within the meaning of Section 45 of the *Employment Act, 2007*.



34. As regards the reliefs sought, counsel submitted that the Claimant was entitled to 12 months compensation as was the case in *Peter Mwaura & another v National Bank of Kenya* [2020] eKLR and *Kiptum Nyaoke v Kenya Posts Office Savings Bank* [2022] eKLR.

Respondent's submissions

35. Counsel isolated two issues for determination, namely;

- i. Whether the Claimant was unlawfully and unfairly terminated from his employment.
- ii. Whether the Claimant is entitled to the reliefs sought.

36. As regards termination, counsel submitted that the Claimant had no formal contract of employment with the Respondent but earned a consolidated salary.

37. Counsel submitted that the Claimant had not adduced evidenced of unfair termination of employment.

38. That there was no evidence that the Claimant went back to his work place to confirm that he co-operated with the police or had been exonerated and had no evidence that he called or sent a message to the Respondent.

39. Counsel submitted that in the circumstances, the issue of unfair termination did not arise.

40. Reliance was made on the decision in *Wycliffe Sagara Radagi V Shirdi Trading Stores Ltd* (2018) eKLR to urge that the *Employment Act* allowed an employer to dispense with a hearing where circumstances of the case justified it. In this case, the employee had absconded duty.

41. The court was urged to find that the Claimant was not unfairly terminated from employment.

42. As regards the remedies sought, counsel submitted that a declaration that termination of employment was unfair was unwarranted and the salary for April 2017 was paid.

43. Counsel submitted that notice pay was not due as the Claimant's employment was not terminated.

44. It was counsel's submission that the Claimant's salary was consolidated and was thus not entitled to house allowance.

45. As regards service pay, counsel relied on Section 35(5)(6) of the *Employment Act* since the Claimant admitted having been a member of the NSSF.

46. On leave, counsel relied on the decision in *Robert Indiazi V Tembo Sacco Ltd* (2018) eKLR to urge that the Claimant was not entitled to leave pay.

Findings and determination

47. The issues for determination are;

- i. Whether the Claimant was employed by the Respondent in 2014 or 2016.
- ii. Whether termination of the Claimant's employment was unfair.
- iii. Whether the Claimant is entitled to the reliefs sought.



48. As to whether the Claimant was employed in November 2014 as he alleges or April 2016 as the document he has provided reveals, the Respondent submitted that the different dates of employment was sufficient indication that the Claimant's evidence was unreliable.
49. The Respondent denied having employed the Claimant in the capacity or job group or at the salary alleged. It also denied the agreement cited by the Claimant. However, RWI admitted that the document was indeed valid and the Claimant was employed as an Empties Clerk on 1st April, 2016.
50. Puzzlingly, although the Claimant testified that he was employed in November 2014 and had a contract of employment, it was dated 2016.
51. The Claimant allegedly signed the document on an undesignated date and the Respondent did not sign it.
52. Similarly, the Claimant provided a copy of his employment card showing that he was a Storekeeper and a single copy of a pay slip for July 2016. The employment card had no date but had the Respondent's logo or trademark.
53. Strangely, the Claimant adduced no evidence as to how he was being paid monthly salary.
54. In a nutshell, the Claimant has nothing to show that he was employed by the Respondent in November 2014 or as a Security Guard but has documentary evidence showing that he was employed on 1st April, 2016 for a period of 3 years at Kshs.35,000/= per month which is consistent with the payslip on record.
55. Copies of bank statements or NSSF or NHIF statements would have been supportive evidence of the Claimant's date of employment.
56. In the absence of any shred of evidence that Claimant and the Respondent had an employer/employee relationship prior to 1st April, 2016, the court is satisfied and finds that the Claimant has failed to prove on a balance of probabilities that he was employed by the Respondent in November 2014.
57. As regards termination of employment, while the Claimant's counsel submitted that it was neither substantively justifiable nor procedurally fair, counsel for the Respondent submitted that the issue did not arise as the Claimant was unco-operative with the police in order to exonerate himself from blame.
58. The provisions of the [Employment Act](#), 2007 prescribe the substantive and procedural requirements of termination of employment.
59. Section 45 of the Act provides as follows;
 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 –
 - i. related to the employee's conduct, capacity or compatibility or
 - ii. based on the operational requirements of the employer; and
 - c. that the employment was terminated in accordance with fair procedure.



60. These provisions are clear that for a termination of employment to pass the fairness test, the employer is required to establish that he had a valid and fair reason to terminate the employment and did so in accordance with a fair procedure.
61. The foregoing requirements were aptly captured by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR as follows;
- “ . . . For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also 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.”
62. The Court of Appeal adopted similar sentiments in *Naima Khamis v Oxford University Press (EA) Ltd* [2017] eKLR.

Reason for determination

63. Contrary to the Respondent’s counsel’s submission that the issue of unfair termination of the Claimant’s employment did not arise, the Respondent filed a dismissal letter dated 29th April, 2017.
64. Notwithstanding the fact that the copy of letter on record has no receipt or acknowledgement by the Claimant who testified no letter was issued, it is evident that as of 29th April, 2017, the Claimant had been relieved of his duties following the suspension on 25th April, 2017.
65. The reason cited by the Respondent in its letter dated 29th April, 2017 was the Claimant’s “failure to co-operate with the investigations despite numerous efforts to have” his contribution.
66. The reason given by the Respondent may be faulted in various ways.
67. First, the letter lack essential particulars on alleged failure to co-operate with the investigations. The letter has neither date nor time when the Claimant was summoned or called by whoever was carrying out the investigations or the police.
68. Second, having been suspended on 25th April, 2017, it is unclear as to when the numerous efforts were made and by whom coupled with the Claimant’s response to the invitations, summons or calls by the police.
69. Third, RWI confirmed that the theft case was reported to the police for investigations but in her own words no investigation took place because the Claimant did not report to the police when he was invited, a fact she alleged was confirmed by the police Investigating Officer. She stated that the Respondent’s hands were tied and it did not investigate the theft itself and the matter was still pending, many years after the Claimant’s dismissal from employment.
70. Regrettably, RWI availed no evidence as to when the Claimant became unco-operative or failed or refused to honour police summons or calls.
71. More significantly, the police Investigating Officer was not invited to give evidence on the status of the investigations or conduct of the Claimant. The retort by RWI on re-examination that summons are issued by the police could not avails the witness as she was the one who alleged that the Claimant was unco-operative. It was incumbent on her to demonstrate what the Claimant did not do to show that he was unco-operative.



72. Third, the fact that the Claimant was dismissed from employment before the police or the Respondent had investigated the alleged theft would appear to suggest that the Respondent did not base its decision on facts. The Respondent adduced no evidence to show that indeed the theft was reported to the police and when.
73. It is not surprising that the Claimant was not taken through a disciplinary hearing.
74. Fourth, the Claimant maintained that the alleged theft took place during the day and he was on night shift, an allegation the Respondent did not controvert by evidence.
75. 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 of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
76. In the instant suit, the Respondent has failed to demonstrate that the Claimant was unco-operative and concomitantly failed to prove that it had a valid and fair reason to terminate the Claimant's employment as by law required.

Procedure for termination

77. Section 41 of the *Employment Act*, 2007 prescribe the mandatory process to be complied with by the employer prior to termination of employment.
78. In *Pius Machafu Isindu v Lavington Security Guards Ltd* [2017] eKLR, the Court of Appeal underscored the foregoing as follows;
“A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination.”
79. The essential elements of Section 41 have been explained in legions of decisions including *Loice Atieno v Kenya Commercial Bank* [2013] eKLR by Radido J. and by the Court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR.
80. In the latter case, the court discerned four elements namely; explanation of grounds, reasons for which termination was being considered, presence of another employee and hearing and consideration of the representations.
81. In this case, RWI confirmed the Claimant's allegation that he was neither heard nor taken through a disciplinary hearing.
82. The witness was categorical that;
“The Claimant was not taken through a disciplinary hearing.”
83. Evidently, the mandatory provisions of the *Employment Act* were not complied with.
84. For the foregoing reasons, the court is satisfied and finds that termination of the Claimant's employment was procedurally defective for non-compliance with the provisions of Section 41 of the *Employment Act*, 2007.
85. As regards entitlement to reliefs, the court proceeds as follows;



- a. Having found that termination of the Claimant's employment was not conducted in accordance with the provisions of the *Employment Act, 2007*, a declaration that the same was unfair and unlawful is merited.
- b. Declaration on discrimination
86. The Claimant adduced no iota of evidence that the Respondent's conduct towards him was discriminatory in any respect.
The declaration is unmerited and it is declined.
- c. Salary for April 2017
87. On cross-examination, the Claimant confirmed that the salary for April 2017 was paid.
The prayer is declined.
- d. One month's salary in lieu of notice Kshs.35,000/=
88. From the evidence on record, the alleged incident happened around 25th April, 2017. The Claimant was suspended on the same day by word of mouth and dismissed from employment on 29th April, 2017.
89. The Respondent tendered no evidence to show that it accorded the requisite notice in compliance with the provisions of Sections 35 or 36 of the *Employment Act, 2007*.
90. Consequently, the prayer for one month's salary in lieu of notice is merited and is accordingly granted.
- e. House Allowance
91. Although the Respondent's counsel submitted that the Claimant's salary was consolidated, the Respondent's witness Vivianne Wafula adduced no evidence be it oral or documentary to prove that the Claimant's salary was consolidated. This position is embellished by the fact that a copy of the payslip on record, availed by the Claimant and which the Respondent did not disown states that the Claimant's basic pay was Kshs.35,000/= and no allowances were included.
92. Needless to emphasize, housing is a statutory right under the provisions of Section 31 of the *Employment Act, 2007* and an employer is free to provide housing to the employee or pay a housing allowance or a consolidated salary.
93. The rate of 15% of the basic pay used by the Claimant is reasonable as held by the Court of Appeal in *Grains Pro Kenya Inc. Ltd V Andrew Waitbaka Kiragu* (2019) eKLR.
94. Having found that the Claimant was employed by the Respondent on 1st April, 2016 and employment was terminated on 29th April, 2017, the Claimant is entitled to housing allowance for one (1) year at the rate of 15% of the basic salary as follows;
 $(15/100 \times 35,000/=) \times 13 = \text{Kshs.}68,250/=$.
The Claimant is awarded the sum of Kshs.68,250/= as housing allowance for the duration served.
- f. Leave Allowance
95. The Claimant's prayer for leave allowance is for 52 days of unutilized leave days. Puzzlingly, neither the Claimant's written statement dated 21st September 2017 nor the oral evidence adduced in court show that the Claimant did not proceed on leave or had unutilized leave days. In absence of essential evidence, the claim for leave allowance is declined.



- g. Service pay for 2 years
96. On cross-examination, the Claimant confirmed that the Respondent was remitting his NSSF contributions.
97. The court is thus in agreement with the Respondent counsel's submission that no service pay is due to the Claimant by virtue of Section 35(6)(d) of the Employment Act, 2007, as the Claimant was a member of the NSSF.
- h. 12 month's salary compensation
98. Having found that termination of the Claimant's employment was unfair for want of a substantive justification and procedural fairness, the Claimant is entitled to the relief provided by Section 49(1) (c) of the Employment Act, 2007, subject to observance of the parameters catalogued in Section 49(4) of the Act.
99. The court has taken the following into consideration;
- i. The Claimant was an employee of the Respondent for a duration of 13 months, a fairly long time.
- ii. The Claimant testified that he was aware that an item was lost sometime in April 2017 but further testified that he was on night shift and the loss occurred during the day. Other than this statement, the Claimant did not write a statement of his own as a response to the suspension or make known his explanation having been accused of the alleged theft.
- iii. The Claimant served the Respondent diligently and had no record of misconduct.
- iv. The Claimant did not express his wish or desire to continue in the Respondent's employment and had no evidence that he either called, texted or wrote to the Respondent regarding resumption of duty or appeal the suspension.
100. For the foregoing reasons, the court is satisfied that the equivalent of 3 months salary is fair.
- i. General damages for emotional trauma, humiliation and loss of dignity
101. The Claimant adduced no evidence of entitlement to general damages as claimed and availed no evidence of the alleged loss as attributable to the loss of employment.

The claim is declined.

102. In the upshot, judgement is entered for the Claimant against the Respondent in the following terms;
- a. Declaration that termination of the Claimant's employment was unfair.
- b. One month's salary in lieu of notice Kshs.35,000.00.
- c. House Allowance of Kshs.68,250.00
- d. Equivalent of 3 months salary Kshs.105,000.00.
- e. Certificate of service.
- f. Costs of the suit.
- g. 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 10TH 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

