



**Okanga v Mombasa Island Cargo Terminal (Cause 10 of 2019)  
[2023] KEELRC 1117 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1117 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 10 OF 2019**

**AK NZEI, J  
MAY 4, 2023**

**BETWEEN**

**JAMES AGGREY A OKANGA ..... CLAIMANT**

**AND**

**MOMBASA ISLAND CARGO TERMINAL ..... RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent vide a memorandum of claim dated 7/3/2019 and pleaded that he was employed as a technician by the Respondent on 1<sup>st</sup> December 2014, earning a monthly salary of ksh., 96,000. The Claimant further pleaded:-
  - a. that the Claimant was terminated from employment by the Respondent on January 14, 2019 without prior notice or payment in lieu thereof.
  - b. that the termination was unfair and without any justifiable cause, and that the Claimant was not given an opportunity to be heard; and that the termination violated the principles of natural justice as well as the provisions of section 41,43,45 and 49 of the *Employment Act* and the ILO *Convention on Termination of Employment* 1982 and article 41(1) of *the Constitution* of Kenya.
  - c. that the Respondent failed, refused and/or neglected to issue the Claimant with an itemized pay statement pursuant to Section 20(1) of the *Employment Act*.
  - d. that the relationship between the Claimant and the Respondent qualified for conversion to term contract entitling them to terms and conditions of service as provided in the *Employment Act*.
2. The Claimant set out his claim against the Respondent as follows:-
  - a. one month salary in lieu of notice .....ksh. 96,000



- b. leave pay (21 days x4 years).....ksh. 268,800
  - c. compensation for unfair termination of employment (12 months x 96,000).....ksh. 1,152,000
  - d. years of service (15 days x4 years ).....ksh. 192,000  
Total ksh. 1,708,800
  - e. a declaration that the Claimant's termination was unfair.
  - f. an order directing the Respondent to issue the Claimant with a certificate of service.
  - g. costs of the suit and interest at Court rates.
3. Other documents filed by the Claimant included a verifying affidavit, the Claimant's written witness statement filed on 7<sup>th</sup> March 2019 and a list of documents dated 7<sup>th</sup> March 2019. Documents listed on the list of documents included the Claimant's letter of employment dated 10<sup>th</sup> November 2014, dismissal letter dated 14<sup>th</sup> January 2019 and a demand letter. The Claimant also filed a further list of documents dated 3<sup>rd</sup> June 2022 listing three documents which included a sick sheet from St. Thomas Maternity Hospital, a medical note from Avenue Healthcare and medical records from Agakhan Hospital.
  4. The Respondent filed a Response to the Memorandum of Claim on 9<sup>th</sup> June 2022 admitting to having employed the Claimant but denying his claim. The Respondent further pleaded that the Claimant constantly absented himself from work and was called to a disciplinary hearing which he failed to attend without reasonable excuse for the failure.
  5. It was the Respondent's further pleading that payslips and bank transfer statements were availed to all employees and that the Claimant was paid his terminal dues and did not have any pending payment due from the Respondent.
  6. It was the Respondent's further pleading that the Claimant took leave and was paid all his leave allowances, was not entitled to severance pay since his NSSF contributions were being remitted, that the Claimant's employment was procedurally terminated and that the Claimant is not entitled to the reliefs sought.
  7. Other documents filed by the Respondent included written witness statements of Elvis Mrima and Teddy Onyango, and a list of documents dated 2<sup>nd</sup> June 2022 listing six documents. The listed documents included the Claimant's Pension Exit Notification, disciplinary hearing notification dated 9<sup>th</sup> January 2019, summary dismissal letter dated 14<sup>th</sup> January 2019, the Claimant's July 2018 payslip with leave pay, the Claimant's payslip for January 2019, the Claimant's employment contract and a bundle of leave application forms.
  8. When trial opened, the Claimant adopted his filed witness statement as his testimony and produced in evidence the documents mentioned in paragraph 3 of this judgment. The Claimant further testified :-
    - a. that he was employed on 1/12/2014 and worked as a workshop technician, and that he was the only person in his department.
    - b. that he was terminated on 14/1/2019 on allegation that he was absenting himself from duty, and that the reason why he did not attend the disciplinary hearing referred to in his dismissal letter was because he fell sick the night before the hearing and went to the hospital where he was given a sick sheet (exhibit no. 4).



- c. that the disciplinary hearing was supposed to be on a Friday and when he went to work the following Monday, he was told by the Respondent's Management that a disciplinary letter had already been written. That he would have attended the hearing had he been well.
  - d. that the Claimant, being the only person in his department, worked without leave, holidays or weekends, and only took leave that had been approved by the Respondent.
  - e. that the Claimant was not given notice or paid in lieu thereof and was only paid half salary upon termination. That his monthly salary was ksh. 96,000.
9. Cross-examined, the Claimant further testified:-
- a. that the invitation letter dated 9/1/2019 simply invited him for a disciplinary hearing and did not ask him to write a response thereto.
  - b. that the Claimant was taken to hospital at night as he had high blood pressure and ulcers, was admitted and discharged the following day.
  - c. that the Claimant was only paid in lieu of leave for one year, though he had claimed leave pay for four years. That the reason that the Claimant could not take leave and only took about three days at a time was because he was the only person in his department (section) and could not be away for long.
10. The Respondent called two witnesses. The first witness, Elvis Mrima (RW-1) told the Court that he was an Operations Manager in the Respondent company and that the Claimant used to work under him as the company's technician. He adopted his filed witness statement dated 28/4/2022 as his testimony and produced in evidence the Respondent's documents referred to in paragraph 7 of this judgment. RW-1 further testified that the Claimant was terminated because he was not at work most of the times; and that when he was given a notice to show cause, he did not show up.
11. Cross-examined, RW-1 further testified that in the Respondent company, employees were entitled to 21 leave days per year, and that in the year 2015, the Claimant took 3 leave days and 16 days in 2016. That the disciplinary hearing notice dated 9/1/2019 was served on the Claimant on the same date and he signed without indicating the date of receipt.
12. Re-examined, RW-1 testified that the ksh. 84,338 paid to the Claimant in July 2018 was a lumpsum for leave not taken, and that the Claimant did not produce any sick sheet before dismissal.
13. The Respondent's second witness, Teddy Onyango (RW-2), told the Court that he was the Respondent's Group Legal Officer. He adopted his filed witness statement dated 15/7/2022 as his testimony. He testified that proper procedure was followed in terminating the Claimant's employment. That the Claimant having failed to attend a scheduled disciplinary hearing, the company was left with no option but to dismiss him.
14. Cross-examined, RW1 testified that other than the disciplinary hearing invitation letter stating the number of days that the Claimant was absent from work, the Respondent did not have any other document/evidence on his absence. That the Respondent had not filed any warning given to the Claimant regarding absence from work.
15. Having considered the pleadings filed and evidence presented by both parties, issues that present for determination, in my view, are as follows:-
- a. whether termination of the Claimant's employment was unfair.



- b. whether the Claimant is entitled to the reliefs sought.
16. On the first issue, in determining fairness or otherwise of termination of an employee's employment by an employer, the Court looks at both procedural and substantive fairness. It was held as follows in the case of *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. On procedural fairness, section 41 of the *Employment Act* sets out a mandatory procedure that must be followed by an employer considering termination of an employee's employment on account of misconduct, poor performance or physical incapacity. The Respondent in the present case alleged constant absence from duty on the part of the Claimant. Absenteeism from duty without lawful cause is a gross misconduct under section 44(4) (a) of the *Employment Act*. That brings the Claimant's case herein within the purview of section 41 of the *Employment Act* which provides:-
- “(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.”
18. The Respondent's letter to the Claimant dated 9<sup>th</sup> January 2019 did not inform the Claimant of his rights under section 41 of the *Employment Act*, and did not give him the right and opportunity to respond to the allegations levelled against him by the Respondent. It simply invited him to attend a disciplinary hearing on January 11, 2019, a day from the date of the said letter.
19. I have noted from the said invitation letter, which appears to have doubled up as a charge sheet/notice to show cause letter, that particulars of the dates on which the Claimant was alleged to have been absent from duty were not given. RW-2 told the Court, under cross-examination, that the Respondent had not availed in Court records on the dates that the Claimant was alleged to have been absent from duty. What therefore, was the Claimant supposed to respond to at the disciplinary hearing?”
20. A charge sheet (show cause letter) in labour laws and procedures is a statement or a memorandum of accusation of wrongs, breaches misconducts, acts or omissions levelled against an employee, and consists of facts which the employer wishes to establish against an employee.
21. The charge sheet/memorandum of accusations seeks to fulfil one of the basic postulates of the rules of natural justice that a fair opportunity of being heard must be given to a person accused of wrong doing. A fair hearing would not be possible unless the accused employee is specifically told of the allegations levelled against him so that he may specifically state his reply to the charges as enumerated against him.



22. In my view, failure by the Respondent to ask the Claimant to make a written response to the general allegations levelled against him was unfair, and amounted to an injustice. Further, the invitation letter dated 9<sup>th</sup> January 2019 gave the Claimant only one day to prepare for the disciplinary hearing. The Claimant's allegations of having fallen sick the night before the disciplinary hearing may, in my view, not be far-fetched. Treatment and clinical notes were produced in evidence by the Claimant. This evidence was neither shaken nor rebutted by the Respondent.
23. A memorandum of accusation against an employee serves a purpose that is different from that which is served by a hearing notice/invitation. Combining the two amounts to an injustice and is unfair. Each should be given separately and an employee given adequate notice and/or time thereon. In my view, a notice of between three and seven clear days is fair.
24. It is my finding that the procedure adopted by the Respondent in terminating the Claimant's employment was unfair.
25. On validity of reasons for termination of the Claimant's employment, the Respondent did not demonstrate that the Claimant was absent from duty on any given date. The Respondent relied on the general allegations made in the letter of invitation dated January 9, 2019. No work/duty attendance registers were produced, and no clocking in records were produced. Section 43 of the *Employment Act* provides as follows:-
- “(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or the 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.
- (2) 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.”
26. Section 47(5) of the *Employment Act* provides as follows:-
- “for any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or unlawful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or unlawful dismissal shall rest on the employer.”
27. Section 45(4) (b) of the *Employment Act* on the other hand provides:-
- “(4) A termination of employment shall be unfair for the purpose of this part where
- (a) .....
- (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.”
28. The Court of Appeal stated as follows in *Kenfright [E.A] Ltd -Vs- Benson K. Nguti* [2016] eKLR:-
- “.....it is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that the reason related to the employee's conduct, capacity, compatibility or is based on the operational requirements of



the employer. The employer must also prove that the termination was in accordance with fair procedure....

Apart from issuing a proper notice according to the contract (or payment in lieu of notice provided), an employer is duty bound to explain to an employee, in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken.”

29. As already stated in this judgment, the Claimant was not given a fair notice of the disciplinary hearing, and was not informed of his rights under section 41 of the *Employment Act*. The Respondent did not demonstrate that the reason for the termination was valid and fair. In view of this, it matters not that the Claimant did not attend the disciplinary hearing scheduled for 11<sup>th</sup> January 2019. I find and hold that termination of the Claimant’s employment was procedurally and substantively unfair, and I so declare.

30. On the second issue, and having found 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. 96,000x9 = ksh. 864,000

31. The claim for ksh. 96,000 being payment in lieu of notice is allowed pursuant to section 35(1) (c) of the *Employment Act* and Clause 4.1 of the Claimant’s contract of employment. The Respondent did not rebut the Claimant’s pleading and evidence that termination notice was not given and payment in lieu thereof was not made.

32. On the claim for unpaid leave days, RW-1 testified that the Claimant took 3 leave days in the year 2015 and 16 days in the year 2016, and that ksh. 84,338 being leave pay was paid to the Claimant in July 2018. That the Claimant was entitled to 21 leave days per year. The Claimant did not rebut this evidence.

33. The Claimant worked for four years and out of the 84 leave days entitlement, he took a total of 19 days’ leave and was paid ksh. 84,338 towards unpaid leave days in July 2018. I award the Claimant ksh. 123,662 being payment for unpaid/outstanding leave days.

34. The claim for service pay is declined. The Claimant was shown by the Respondent to have been a member of a Pension Scheme. Further, the Claimant’s contract of employment did not provide for payment of service gratuity. The Court of Appeal held as follows in *Bamburi Cement Limited -vs- William Kilonzi* [2016] eKLR:-

“ turning to the award of gratuity, the first thing that we must emphasize is that gratuity, as the name implies, is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement or upon death of an employee, as a lump sum amount at the discretion of an employer. The employee does not contribute any sum or portion of his salary towards payment of gratuity. An employer may consider the option of gratuity in lieu of pension scheme.”

35. In sum, and having considered written submissions filed by Counsel for both parties, judgment is hereby entered for the Claimant against the Respondent as follows:-

- a. Compensation for unfair termination of employment .....ksh 864,000
- b. Payment in lieu of notice .....ksh. 96,000



c. Unpaid leave days .....ksh. 123,662

Total ksh. 1,083,662

36. The awarded sum shall be subject to statutory deductions pursuant to section 49(2) of the *Employment Act*.
37. The Respondent shall issue the Claimant with a Certificate of Service pursuant to section 51 of the *Employment Act* within thirty days of this judgment.
38. The clamant is awarded costs of the suit and interest at Court rates.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 4<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 Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

**Appearance:**

Ms Onkobi for Claimant

Ms Charo for Respondent

