



**Anyango v Nairobi Academy (H) Limited (Cause 1119 of 2017)  
[2023] KEELRC 1611 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1611 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1119 OF 2017  
SC RUTTO, J  
JUNE 30, 2023**

**BETWEEN**

**ROSELINE PAMELA ANYANGO ..... CLAIMANT**

**AND**

**NAIROBI ACADEMY (H) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant avers that she was employed by the respondent on January 4, 2000 as the Head of Catering and Housekeeping. She avers that in the month of December, 2016 she was unwell and was put on bed rest for the entire month of January, 2017. Upon resuming work on February 3, 2017, things were normal. She contends that without any colour of right, warning or prior notice the respondent issued her with a letter of termination dated March 8, 2017. That the letter did not give any reason for her termination. It is against this background that the claimant seeks against the respondent the sum of Kshs 1,776,795.00 being gratuity, notice pay, 9 days worked in the month of March, 2017, compensatory damages, general damages, certificate of service and costs of the suit.
2. The respondent challenged the claim through its response in which it avers that the claimant was guilty of indiscipline and poor working ethics on numerous occasions. The respondent avers that the claimant did not formally inform it why she did not report on duty in December, 2016 and January, 2017. It further denies that the claimant was an exemplary employee. According to the respondent, the claimant's termination was fair and lawful hence it has asked the Court to dismiss the suit with costs.
3. The matter proceeded for hearing on February 8, 2023 during which both sides called oral evidence.

**Claimant's Case**

4. The claimant testified in support of her case and to start with, she adopted her witness statement to constitute her evidence in chief. She also produced the documents filed on her behalf as exhibits before court.



5. In her evidence, the claimant stated that she was in charge of eight members of staff and had a very cordial working relationship with the management and she received compliments for her good work.
6. She further testified that she never had any disciplinary case with the management since she was employed.
7. It was the claimant's testimony that she fell sick in December, 2016, underwent an operation on December 29, 2016 and was given bed rest by her doctor the whole of January, 2017. She reported to work on February 3, 2017, went to the Manager's office and later to the Director's office. They both welcomed her back to work.
8. She resumed her full duties and things seemed very normal and she earned her full salary in the month of February, 2017. Without any warning or prior notice, she received a letter of termination of employment dated March 8, 2017 signed by the respondent's Director, Mr F M Kirugu.
9. According to the claimant, she was actually ambushed and did not know what to do. She had no pending disciplinary case and was not involved in any gross misconduct and was not granted any hearing by the management before the decision to terminate her services was arrived at. She further stated that no due process was followed and she ought to be fully compensated for unfair termination.

### **Respondent's case**

10. The respondent called oral evidence through its Managing Director, Mr Francis Kirugu, who testified as RW1. At the outset, he also adopted his witness statement to constitute his evidence in chief. He further produced the documents filed on behalf of the respondent as exhibits before Court.
11. RW1 stated that the claimant's letter of appointment which contained her terms of service provided that all absence must be notified to the school immediately. That medical absence must be supported by a letter from a doctor.
12. It was RW1's evidence that in late December/January 2017, the claimant just absconded duty and the respondent had to call her back to work. During her employment, the claimant performed below par. She was given several warnings but she didn't heed nor make any efforts to improve on her performance.
13. RW1 further stated that in terminating the claimant's employment, the respondent complied with all the provisions of her contract of employment hence her prayers are unlawful, not deserving and the Claim should be dismissed with costs.

### **Submissions**

14. It was submitted on behalf of the claimant that her termination was unfair, unjust and unlawful and that the respondent had no valid reason to warrant her termination. In support of the claimant's submissions, the cases of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR and *Gibson D Mwanjala v Kenya Revenue Authority* [2015] eKLR were cited.
15. On the part of the respondent, it was submitted that it had proved that the claimant deserted duty and extended her Christmas vacation without any permission or notifying anybody and hence it was entitled to invoke Section 44(4) of the *Employment Act* to terminate her employment under summary dismissal since the school had to move on. It was further submitted by the respondent that the claimant had the burden to prove that she was sick and given bed rest for one month by a medical doctor. To this end, the Court was referred to the cases of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR and *Naima Khamis v Oxford University Press (EA) Limited* [2017] eKLR. It was the



respondent's further submission that by signing and receiving the settlement package, it was evident that the parties intended on settling the matter amicably.

### **Analysis and Determination**

16. Flowing from the pleadings on record, the evidentiary material before me as well as the opposing submissions, it is clear that the Court is being called to resolve the following questions: -

- i. Whether there was a justifiable reason to terminate the employment of the claimant;
- ii. Whether the claimant was afforded procedural fairness prior to termination;
- iii. Is the claimant entitled to the reliefs sought?

Whether there was justifiable reason to terminate the services of the claimant

17. The starting point in determining this issue is Section 43(1) of the *Employment Act* (Act) which requires an employer to prove reasons for termination and failure to do so, such termination is deemed to be unfair. Additionally, Section 45 (2) (a) and (b) of the Act provides that a termination of employment 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 employees conduct, capacity or compatibility; or
  - ii. based on the operational requirements of the employer; ...

18. The significance of Section 45 (2) (a) and (b) is that the reason for termination must pass the "fairness and "validity" test. Accordingly, beyond proving existence of reasons to justify termination, an employer is required to prove that the said reasons were fair, valid and related to the employee's conduct, capacity or compatibility.

19. Turning to the instant case, the claimant's termination was effected through a letter dated March 8, 2017 which reads in part: -

"Re: Termination of Employment

We regret to advise that after review of various aspects of your work, it has been decided (sic) to terminate your employment with immediate effect.

You will be paid one month's salary in lieu of notice..."

20. It is notable that the respondent did not specify what aspects of the claimant's work it was dissatisfied with. Was it her performance of duty, her conduct at work or attendance to duty? This was not made clear from the claimant's letter of termination. What was clear and not in dispute was the claimant's absence from work in the month of December, 2016 and January, 2017. In this regard, the claimant stated that she was unwell and had undergone an operation hence was placed on bed rest by her doctor. The claimant's assertions notwithstanding, she did not adduce any evidence to confirm that she sought treatment as alleged or that she informed the respondent as much.

21. Pursuant to Section 30 (1) of the Act, an employee is entitled to sick leave of at least 7 days with full pay and thereafter, to sick leave of 7 days with half pay, subject to production of the requisite certificate of incapacity to work signed by a duly qualified medical practitioner.



22. Of significance is subsection (2) of Section 30 which provides that “For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.”
23. The question is whether the claimant notified the respondent of her need for sick leave and actually applied for the same in line with the requirements of the aforementioned provision? This is not evident from the record.
24. I must point out that the Act has placed the burden on the employee to notify the employer of the reasons of his or her absence from work on account of ill health in order to be entitled to sick leave. In this case, the claimant did not state whether she notified the respondent of her medical situation and whether she applied for sick leave as required. Coupled with that, she has not attached any evidence to indicate that she forwarded her medical report, treatment notes or a doctor’s sick off to her employer, so as to notify it of her medical situation.
25. Being the employee in this case and the one in need of the sick leave, it behoved the claimant to keep the respondent posted as regards her medical condition and her readiness or otherwise, to report to work. As I have stated herein, the claimant did not prove that she did this hence she did not act as required under the law and for that reason, her absence from work in the month of December, 2016 and January, 2017 was unexplained. Therefore, the respondent had justifiable cause to take disciplinary action against her on that account. But what did the respondent do in the circumstances? It did not take disciplinary action against the claimant but instead paid her monthly salary for December, 2016, January and February, 2017. Seemingly, the respondent waived its right to take disciplinary action against the claimant and appeared to have pardoned her for her transgressions.
26. What’s more, the letter of termination did not make mention of the claimant’s absence from work in the month of December, 2016 and January, 2017. It would thus mean that in as much as the claimant was absent from work as aforesaid, that was not the real reason why her services were terminated by the respondent. If it were so, nothing would have been easier than for the respondent to indicate as much in the claimant’s letter of termination.
27. Revisiting the claimant’s letter of termination, the reason for her termination from employment was “after review of various aspects of her work”. As stated herein, the said reason is unclear, too general and indeed qualify as vague. As it is, the said reason cannot be tested against the requirements of “validity” and “fairness” under Section 45(2) (a) and (b) of the Act and determined whether it passes muster. How is the Court to review such a reason and indeed ascertain its fairness and validity? As couched, it can mean anything and can apply to anything relating to the claimant’s employment.
28. Suffice to say, the Court is unable to truly ascertain whether the reason leading to the claimant’s termination was valid, fair and related to her conduct, capacity and compatibility.
29. In total sum, the respondent has failed to discharge its evidential burden under the Act hence I cannot help but find that the claimant’s termination was not substantively fair within the meaning of Sections 43(1) and 45(2) (a) and (b) of the Act.



### Whether the claimant was subjected to a fair process

30. Section 45 (2) (c) of the Act, requires an employer to comply with the requirements of fair process and prove that it accorded an employee a fair hearing prior to termination from employment. The specific requirements of a fair hearing are provided for under Section 41 of the Act in the following manner: -
- “(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, an 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 grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
31. From the record, there is no evidence that the claimant was subjected to the process contemplated under Section 41 of the Act. I say so because there is no evidence in the form of a notice requiring the claimant to respond to whatever allegations and to appear in a forum where she would have been given an opportunity to state her side of the story.
32. It is instructive to note that the provisions of Section 41 of the Act are mandatory hence it follows that anything short of that process, is unprocedural unfair. (See the case of *Postal Corporation of Kenya vs Andrew K Tanui* [2019] eKLR)
33. In the circumstances, I arrive at the inescapable conclusion that the claimant’s termination was procedurally unfair within the meaning of Section 45 (2) (c) as read together with Section 41 of the Act.
34. The total sum of my consideration is that the claimant’s termination was neither fair nor lawful hence was unjustified in all respects.

### Reliefs?

35. As the Court has found that the claimant’s termination was substantively and procedurally unjustified, she is awarded compensatory damages equivalent to six (6) months of her gross salary. This award takes into consideration the length of the employment relationship as well as the circumstances attendant to the claimant’s termination.
36. The claim in respect of salary in lieu of notice and for days worked in March, 2017 is declined as it is evident that the same was paid to the claimant at the time of her exit from the respondent’s employment.
37. The claim for gratuity is similarly declined as the claimant has not justified that she is entitled to the same either contractually or on the strength of a Collective Bargaining Agreement the respondent is party to.



## Orders

38. Against this background, I enter Judgment in favour of the claimant against the respondent and she is awarded: -
- a. Compensatory damages in the sum of Kshs 351,840.00 being equivalent to six (6) months of her gross salary.
  - b. Interest on the amount in (a) at court rates from the date of Judgment until payment in full.
  - c. The claimant shall also have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE, 2023.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

**For the Claimant Mr. Ashiruma**

**For the Respondent Mr. Wanjohi**

**Court Assistant Abdimalik Hussein**

**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 had 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.

**STELLA RUTTO**

**JUDGE**

