



**Khindi v Auto Continental Limited (Cause 223 of 2016)
[2023] KEELRC 1665 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1665 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 223 OF 2016**

M MBARÚ, J

JUNE 29, 2023

BETWEEN

STANSLOUS MANGI KHINDI CLAIMANT

AND

AUTO CONTINENTAL LIMITED RESPONDENT

JUDGMENT

1. On 2 December 2019 the court closed the respondent's case after failing to attend court for the hearing. On 10 July 2020 the respondent filed an application seeking to have the case opened so as to give their evidence. The Court allowed the application in a ruling delivered on 13 May 2021.
2. A hearing date was allocated for 13 July 2022, but again the respondent remained absent. The court closed the hearing and directed parties to file written submissions. Instead, the respondent filed application dated 25 July 2022 seeking to re-open the case and to be allowed to call the respondent's case unconditionally. In a ruling delivered on 4 May 2023 this was allowed and a hearing date allocated for 29 May 2023 but on the due date, the respondent was absent. The hearing was marked closed and parties directed to file written submissions. Only the claimant complied.

Claim

3. The claimant is a male adult and the respondent is a limited liability company offering a variety of services including clearing and forwarding.
4. On 1st September 2012 the respondent employed the claimant as a port clerk on casual basis where he worked continuously until 14 June 2015 at a wage of Ksh.15,565 per month.
5. The claim is that the claimant worked for 7 days each week without a rest day from 5Pm until mid night. On 14 June 2015 the respondent called the claimant back to work but he was not available at the time when the director, Arif sent him a text message on his phone terminating his employment



with immediate effect. this resulted in unfair termination of employment as there was no prior notice, hearing or reasons given to justify such sanction.

6. The claim is also that there were underpayments during the tenure of employment contrary to the law and Wage Regulations. The claimant is seeking the following payments;
 1. Notice pay inclusive of house allowance Ksh.19,403.26;
 2. Payment in lieu of taking annual leave Ksh.43,755.84;
 3. Underpayments Ksh.122,253.84;
 4. Overtime work 639,598.50;
 5. Compensation at 12 months pay;
 6. Certificate of service; and
 7. Costs.
7. The claimant testified in support of his case that initially, the respondent employed him as a casual employee on 1st September 2012 and he continued to work in that capacity until 14 June 2015 when he was called back to work at odd hours and when he indicated that he could not make it, the director sent him a text message terminating his employment. at the time, the claimant was working as the port clerk in the transport department at a salary of Ksh.13,565 per month. The respondent continued to treat the claimant as a casual employee over the years without giving him a rest day, annual leave or paying his house allowance and when his employment was terminated, he was not given notice or a hearing or paid his terminal dues.
8. The response filed is that the claimant was given two warnings on 11 February 2015 and 25 April 2015 and then found to be of gross insubordination and failing to obey lawful instructions given while at work. The response is also that the claimant was also guilty of frequent absenteeism leading to termination of his employment upon payment of terminal dues in full.
9. The response is also that the claim for Ksh.639,598 is not justified and the entire claim should be dismissed with costs.
10. As outlined above, despite the respondent being indulged by the court severally, there was no attendance or call of evidence during the hearing.
11. The claimant filed his written submissions which are put into account and the issues which emerge for determination are whether there was unfair termination of employment and whether the relief sought should issue.

Parties filed a joint list of issues.

12. Employment is not disputed. The issues in dispute are whether there was unfair termination of employment; whether terminal dues claimed should be awarded; and whether there was continuous employment of the claimant by the respondent.
13. With employment agreed as existing for the period claimed, the last issue is addressed. The claimant remained in the continuous service of the respondent from 1st September 2012 until 14 June 2015. Such then removed the claimant from an employee under casual terms of service to an employee protected under the provisions of Section 37 of the *Employment Act*, 2007.



14. The fact of the claimant being paid monthly and not at each end of day is also not disputed. The claimant filed his various payment statement for each month demonstrating that his wages would be paid monthly unlike a casual employee who is sourced each day and his wages paid daily. With monthly wages, the claimant became protected under the Act with rights and benefits there from.
15. The above is buttressed by the respondent who filed a letter of appointment dated 30 August 2012 appointing the claimant as a port clerk. There are the two warning letters referred to in the response and the letter of summary dismissal dated 15 June 2015.
16. Summary dismissal is a sanction that the employer is allowed to issue where the employee is in fundamental breach of the employment contract and or is of gross misconduct in terms of Section 44(3) and (4) of the Act. The employer is also allowed, based on the nature of its business, to issue a policy with regard to what constitutes gross misconduct over and above the parameters outlined under Section 44(4) of the Act.
17. However, the right to summarily dismissal an employee is conditional.. The employer must abide the provisions of Section 41(2) of the Act. issue notice to the employee and hear the employee on his representation in the presence of another employee of his choice. Where the employer is unable to hear the employee at the shop floor for reasons beyond its control, such circumstances must be addressed for the court to fully appreciate and make a finding. The example may be that the employee has absconded duty and despite being called to allow for disciplinary hearing, the employee refused to oblige.

Section 41(2) hence requires that;

- (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.
18. Whether there is gross misconduct or misconduct, a hearing of the subject employee at the shop floor is mandatory. This is given emphasis by the Court of Appeal in the case of *Oyombe v Eco Bank Limited* (Civil Appeal 185 of 2017) [2022] KECA 540 (KLR) (13 May 2022) (Judgment) that;

... Section 41 of the *Employment Act* which provides the minimum threshold of a fair procedure that an employer ought to comply with in summarily dismissing an employee. The said section provides for notification and hearing before termination on grounds of misconduct in the following way:-

...

Under this Section, four elements must thus be satisfied for summary dismissal procedure to be said to be fair, being: -

- a) An explanation of the grounds of termination in a language understood by the employee;
- b) The reason for which the employer is considering termination;
- c) Entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations is being made;
- d) Hearing and considering any representation made by the employee and the representative chosen by the employee.



19. The Court of Appeal in a different case of Postal Corporation of Kenya vs Andrew K. Tanui [2019] eKLR also held that;
20. Admittedly, there has been considerable debate as to what amounts to a fair hearing or procedure in disciplinary proceedings. Indeed the appellant has cited the Kenya Revenue Authority case where this Court held that the fairness of a hearing is not determined solely by its oral nature, and that a hearing may be conducted through an exchange of letters as happened in that case. It also held that whether an oral hearing is necessary will depend on the subject matter and circumstances of the particular case and upon the nature of the decision to be made. We believe that is still good law, but not in respect of a hearing before termination as envisaged under Section 41 of the Act. It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with. The section provides for
21. The warnings already issued to the claimant taken into account, under the law, he was entitled to a hearing before the summary dismissal. These warnings are only relevant in terms of Section 45(5) of the Act when assessing the terminal dues payable and cannot be applied to deny him the due process of the law.
22. Without any evidence of the respondent giving the claimant a hearing before termination of his employment, the same was procedurally unfair.
23. Notice pay is due at the last wage payable for the position of a port clerk. The wage of Ksh.19,403.26 is fair in terms of the Wage Orders in this regard and which is inclusive of the due house allowance in terms of Section 49(1)(b) of the Act.
24. For the unfair termination of employment, the claimant served the respondent from the year 2012 to 2015. He had two warning letters and these put into account, compensation at 5 months is found justified all based on the gross due wage of Ksh.19,403.26 total due is Ksh.97,151.30.
25. On the claim for annual leave from January 2012 to December 2013, Section 28 of the Act give the right to taking annual leave or payment in lieu thereof save such right must be secured within 18 months or approved to be taken forward. Where this is not addressed, it becomes a continuous injury regulated under Section 90 of the Act.
26. On the claim for underpayments, the respondent as the employer is the legal custodian of work records in terms of Section 10(6) and (7) of the Act. Upon being served with the claim herein the respondent filed time sheets but nothing to demonstrate the claimant was paid his due wages inclusive of housing allowance or was paid an allowance inclusive of the same in terms of Section 31 of the Act.
27. In the Memorandum of Claim at paragraph (III) (h) (3) the claimant has outlined the underpayments based on each year minimum wage and correctly applied the same with a total underpayment of Ksh.122,252.84 which is due. this tabulation is properly applied for each year from 2012 to 2015.
28. On the claim for overtime work, the respondent filed time sheets for work on Sundays. These reflect work from 0800am to 2100hour or to 2130hours. Some have 8.30am to 1800hours or 1830hours or 1900 to 1930hours.
29. The claimant has applied a daily rate of overtime work for 242 days and 730 days without taking into account the record submitted by the respondent. Such a general claim for a total 5 hours each day without taking into account the hours differed each day and particularly the heightened Sundays compromises this aspect of his claim.



30. A certificate of service is due to an employee at the end of employment in terms of Section 51 of the Act. this should issue unconditionally once the claimant has cleared.
31. On costs, the claim being successful, these shall be awarded.
32. Accordingly, judgment is hereby entered for the claimant against the respondent and a declaration that employment was terminated unfair;
 - a. Compensation awarded at Ksh. 97,151.30.
 - b. Notice pay Ksh.19,403.26;
 - c. Underpayments at Ksh. 122,252.84;
 - d. Certificate of service; and
 - e. Costs of the suit.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

