



**Kamuyu v Habitech Consultants Limited (Cause E132 of 2022)
[2023] KEELRC 1533 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1533 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E132 OF 2022
BOM MANANI, J
JUNE 15, 2023**

BETWEEN

ANGELA MUTHONI KAMUYU CLAIMANT

AND

HABITECH CONSULTANTS LIMITED RESPONDENT

JUDGMENT

Introduction

1. The parties to this action entered into an employment relation on 20th December 2017 when the Respondent hired the Claimant's services as an architect. This relation came to an end in August 2021 when the Respondent issued the Claimant with a notice of termination of employment dated 3rd August 2021.
2. The Claimant has challenged the legality of the termination. It is her case that the termination violated the law and was unfair. And hence her action for compensation.
3. The Respondent has resisted the action. According to the Respondent, the Claimant was legitimately relieved of her employment. Therefore, the Claimant's case for compensation is without merit and ought to fail.
4. In addition, the Respondent has filed a counterclaim against the Claimant. In the counterclaim, the Respondent argues that the Claimant failed to work during the period of the notice for termination of the contract between the parties. She also failed to deliver on other aspects of her employment contract for which she had been facilitated. As a result, the Respondent seeks reimbursement of its financial outlay to the Claimant.



Claimant's Case

5. The Claimant states that the Respondent hired her services on 20th December 2017. She served the Respondent in the position of an architect until the time her contract was allegedly unlawfully terminated sometime in August 2021. At the time of their separation, the Claimant states that she was earning a monthly salary of Ks. 160,000.00.
6. According to the Claimant, sometime in July 2021 the Respondent's principal shareholder and lead architect arranged for a business tour to Dubai. The intention of the visit was to source materials for a client.
7. The Claimant indicates that she was required to accompany the lead architect, other employees of the Respondent and representatives of the client on the Dubai trip. That the team travelled as scheduled but the lead architect was taken ill upon their arrival in Dubai. The Claimant states that this development had the inevitable consequence of transferring oversight for the Dubai work on her. She had to step in and execute the work that was meant for the lead architect alongside her assignments.
8. The Claimant asserts that upon finalization of the work, she travelled back home leaving the lead architect behind. On arrival, she was kept at the airport for a considerable duration of time trying to clear computer items that the Respondent had brought in.
9. It is the Claimant's case that these events took a toll on her health. The fact that she had to: work for several days whilst in Dubai without a break; take up the duties of the lead architect after he was taken ill; and go through a protracted clearing process at the airport upon her arrival resulted in fatigue and headache for which she required medication.
10. The Claimant states that she sought medication for her condition the following day. She indicates that she sent two text messages: one to the lead architect on 2nd August 2021 and the other to a workmate at the office on 3rd August 2021 informing them of her fatigue and intention to be off duty in order to seek medication.
11. The Claimant indicates that when she reported to work the following day, she was confronted with a letter terminating her contract of service. Shocked and traumatized by the turn of events, the Claimant states that she asked to be given a few days off to enable her digest the developments and prepare to hand over. It appears that the request was not granted. In a response that was sent to her on 5th August 2021, the Respondent's lead architect informed the Claimant to follow procedure in processing her request.
12. It appears that the Claimant did not continue working after the events of 3rd August 2021. Instead, she asked to be allowed to utilize her pending leave days to serve the notice period. From the record, this request was not processed with the available correspondence showing disagreement between the parties on the number of leave days that the Claimant was entitled to.
13. It is the Claimant's case that the procedure for her release from employment was traumatic. She argues that the process was without regard for the applicable law. Therefore, she prays for various reliefs as more particularly set out in her statement of claim.

Respondent's Case

14. On its part, the Respondent confirms that the Claimant served it as an architect until August 2021 when her contract of employment was terminated. It is the Respondent's case that the Claimant's contract was terminated for lawful cause and in accordance with the procedure contemplated in law.



15. The Respondent states that the Claimant unlawfully absented herself from duty prompting the decision to terminate her contract. The Respondent indicates that the Claimant flouted the procedure for seeking permission to be absent from work for reasons of poor health. This conduct rendered her contract amenable to termination at once.
16. The Respondent further argues that the Claimant failed to serve the notice period in contravention of the Respondent's directions in the letter of termination. Further she did not utilize the travel allowance she had been given for August 2021 for the benefit of the Respondent. Therefore, the Claimant is obligated to reimburse the allowance and pay the Respondent salary in lieu of notice.
17. The Respondent has also prayed for reimbursement of money expended on the Claimant during the Dubai trip. It is the Respondent's case that the Claimant did not deliver on her mandate during the Dubai trip. Therefore, she has an obligation to reimburse the Respondent the money that was paid to facilitate the trip.

Issues for Determination

18. The parties did not file a joint statement of issues for determination. As the record discloses, each one of them formulated their individual issues at the stage of final submissions.
19. After evaluating the pleadings and evidence on record alongside the individually framed issues, I am of the view that the following are the issues for determination in the dispute:-
 - a. Whether the Claimant's contract of employment was terminated for lawful cause and in accordance with fair procedure.
 - b. Whether the Respondent's counter-claim is merited.
 - c. Whether the parties are entitled to the reliefs sought in their respective pleadings.

Analysis

20. Sections 41, 43 and 45 of the *Employment Act* obligate employers who wish to terminate contracts of employment to do so only for lawful cause. Besides, the separation of the parties must be processed in accordance with fair procedure.
21. The contract of employment may have provision for termination of employment on notice. However, this does not take away the obligation on the employer to ensure that the legal requirement on existence of valid reason for termination is observed in the process. Therefore, the Respondent's contention that it terminated the Claimant's contract upon notice in line with the agreement between the parties is of no assistance to its case if there is no evidence that the requirements of sections 41, 43 and 45 of the *Employment Act* were observed.
22. The Respondent has stated that the reason for terminating the Claimant's contract was her failure to turn up for work on August 3, 2021. According to the Respondent, the Claimant's action was in breach of her terms of service.
23. The Claimant has maintained that she was prevented from reporting to work because of sickness. She has filed proof of a text message on 2nd August 2021 to the Respondent's lead architect showing that she informed him of her fatigue and requested for a day off. She has filed evidence of a text message on August 3, 2021 to Jenifer, the office administrator, informing Jenifer that she was unwell. Further, the Claimant has filed medical documents demonstrating that she sought medication on August 3, 2021.



24. The Respondent relies on a clause in the letter of appointment of the Claimant to insist that the Claimant ought to have sought sick off permission from the Respondent's doctor before she took a day off. To the extent that she did not do so, her conduct amounted to gross misconduct for which her contract of service had to be terminated.
25. With respect the letter of appointment does not prescribe dismissal from employment as the penalty for failure to obtain authorization of the company doctor for a sick off. The penalty for such infraction is indicated as the triple deduction of the affected employee's pay for the duration that he has been absent. It is perhaps critical to mention that the fact that an employee has failed to seek the company doctor's sick off approval does not necessarily imply that such employee had no reasonable cause to be absent.
26. Section 44 of the [Employment Act](#) provides that it is gross misconduct for an employee to be absent from the workplace without permission or lawful cause. There is good reason why the law was framed in this way. Whilst it frowns upon absence from duty without permission, the law acknowledges that it is not in all cases that the employee will be able to seek this permission.
27. Where an employee has been absent without permission but for lawful cause, the law will excuse such absence so long as the employee is able to table evidence justifying his absence within reasonable time. In my view, absence from work for verified medical reasons, whether by the company doctor or some other qualified medical practitioner, is one such lawful reason to be absent from work.
28. The fact that the Claimant presented to the Respondent medical evidence of her sickness the following day ought to have been sufficient explanation for her absence the previous day. The fact that what the Claimant presented were medical notes and receipts for payment from another medical provider as opposed to a medical certificate from the Respondent's company doctor ought not to have been reason for the harsh treatment that she received.
29. In any event, the evidence on record shows that at the time the Claimant arrived with her medical documents on Wednesday 4th August 2021, the decision to terminate her employment had already been taken. Her letter of termination dated 3rd August 2021 had already been prepared and was waiting for her. Clearly, whether she had a reasonable explanation for her absence was immaterial to the employer's decision in the circumstances. It was enough that she had been away without the express permission of the employer notwithstanding that there is evidence that the Claimant had communicated her challenge to the employer earlier on.
30. On the basis of the evidence on record, it is my finding that the Claimant had evidence to demonstrate that she had been prevented from reporting to work on 3rd August 2021 for lawful cause. As a matter of fact, the reason for the Claimant's absence was already within the knowledge of the Respondent's management if the text messages between the parties on the 2nd and 3rd of August 2021 are anything to go by. Consequently, it is my finding that on the basis of the material before me, the Respondent did not have a valid reason to terminate the Claimant's employment contract.
31. In their submissions, the lawyers for the Respondent have cited other factors as justifying the Respondent's decision to terminate the Claimant's contract. In this respect, the lawyers mention the Claimant's failure to submit a hand over report and the fact that she absconded duty.
32. The accusation in respect of failure to hand over relates to the fact that the Claimant failed to file a report on the projects she was handling after she had been issued with the termination letter of 3rd August 2021. The allegation about absconding duty relates to the fact that the Claimant failed to serve the notice period as required in the letter of termination dated 3rd August 2021. It is noteworthy that



- these were events that happened post the decision to terminate the Claimant's contract of service. How can they be applied retroactively to justify the decision to terminate which was earlier in time?
33. With respect to the requirement of fair procedure, section 41 of the *Employment Act* obligates the employer to: inform the employee of the charge against him; hear the employee in response to the charge; and promptly render a decision which ideally should spell out the reasons for the decision. The record does not demonstrate that the Respondent observed these procedural requirements in terminating the Claimant's contract of service. Undoubtedly, the Respondent's decision was in breach of the law in this respect. It is so declared.
 34. The next question relates to whether the counterclaim has merits. Whilst the Respondent asserts that the Claimant was paid travel allowance of Ksh. 15,000.00 to facilitate her work for August 2021, the Claimant denied this fact. According to the Claimant, the sum of Ksh. 15,000.00 paid to her for travel allowance was to reimburse her travel expenses for the month of July 2021. The Respondent did not place before the court evidence to demonstrate the contrary. In the absence of such evidence, this claim fails.
 35. The Respondent has also claimed reimbursement of Ksh. 248,250.00 being the amount spent to facilitate the Claimant's trip to Dubai. From the evidence that was tendered, the Respondent's basis for the claim is that the Claimant did not execute her work in respect of the Dubai trip. Therefore, she ought to reimburse the money that was spent on her.
 36. This claim is rather strange. It was mentioned for the first time in the reliefs section of the counterclaim. It does not feature anywhere in the main body of the counterclaim. It is incomprehensible how a party will pluck a prayer from the blues without laying a basis for it in the Statement of Claim (or counterclaim for that matter) and seek that the court grants it.
 37. Importantly, the Claimant gave evidence that she traveled to Dubai with the Respondent's lead architect. She gave evidence that on their arrival, the lead architect was taken ill and she had to take up both his and her work for nine days. It is only after this that she travelled home.
 38. There was no evidence given by the Respondent to controvert this evidence by the Claimant. On the contrary, the Respondent's lead architect confirmed that indeed the Claimant remained in Dubai for the ten days that had initially been agreed. Further, he confirmed that she took up his role when he fell ill whilst in Dubai. The only issue that he raises is that the Claimant refused to extend her stay in Dubai beyond the time that had been initially agreed in order to complete the assignment. However, he was not able to demonstrate that this request had been specifically directed to the Claimant and that she had declined.
 39. The Claimant's evidence on this matter was that although there had been a request that the period for their stay in Dubai be extended, this was later changed when it became apparent that the assignment had been concluded. The text exchanges between the Claimant and the Respondent's lead architect on 2nd August 2021 corroborate this fact. The texts demonstrate that the Respondent's lead architect allowed the Claimant to travel with some computer equipment meant for the Respondent. It is curious, to say the least, that the Respondent would accuse the Claimant of leaving Dubai without authorization even as it is clear that the very same Respondent's officers had asked the Claimant to travel with and deliver work equipment for the Respondent during her trip back to Kenya.
 40. On the material on record, there is no evidence that the Claimant failed to execute her mandate in Dubai. There is no evidence that the Claimant defied the Respondent's directive to extend her stay in Dubai to clear pending aspects of their assignment. In my view, the demand for reimbursement



- of funds expended on her is a clear attempt by the Respondent to fight off her claim for unfair termination. It is rejected.
41. The Respondent has also claimed for salary for one month in lieu of notice. Whilst the Claimant states that she was entitled to approximately 21 days leave at the time she was dismissed from employment, the Respondent appears to express a different view on the matter. According to the Respondent, the Claimant was entitled to 12.25 leave days when she was issued with the letter of termination. In the Respondent's view, as the law requires a termination notice of one month for the Claimant's contract, it implies that the Claimant had to clock 17.75 days to serve the notice period of 30 days.
 42. Section 28 of the *Employment Act* entitles an employee to minimum annual leave of 21 days for every year worked. The Respondent has given a tabular computation of the Claimant's leave entitlement showing how it arrived at 12.25 days. Whilst the Claimant states that some of the discounted days were taken on account of sick leave, no evidence was provided to support this assertion.
 43. However, the period of notice under section 35 of the *Employment Act* is not intended to cover working days only. The twenty eight (28) days' notice period is inclusive of the four (4) rest days in every month when the employee is not expected to be on duty. Since the Claimant had 12.25 leave days, her obligation to the Respondent was to serve the balance of the twenty eight (28) days after deducting her four (4) rest days and her 12.25 accrued leave days. This means that she owed the Respondent 11.75 days of work or pay in lieu thereof. I will therefore enter judgment for the Respondent against the Claimant for pay in lieu of serving the notice period equivalent to salary for the Claimant for 11.75 days, that is to say Ksh. 62,667.00.
 44. As indicated earlier, the Respondent's decision to terminate the Claimant's employment was flawed both on account of the reason for termination and the procedure followed in actualizing the termination of the contract. Consequently, the court finds that the Claimant is entitled to compensation for wrongful termination.
 45. In determining the relief to grant the Claimant, the court will be guided by section 49 of the *Employment Act*. The court has considered the circumstances leading to the Respondent's decision. It is clear that there was no justification for the Respondent's action. The decision was unnecessarily harsh and exposed the Claimant to emotional anguish.
 46. Clearly and in terms of section 45 of the *Employment Act*, the Respondent did not act in accordance with justice and equity in terminating the employment of the Claimant. The procedure followed in terminating the contract was unfair and contrary to the existing law. The letter communicating the decision did not afford the Claimant the opportunity to challenge it on appeal. There is no evidence of the Claimant having been involved in previous infractions or warnings having been issued to her.
 47. The totality of the foregoing leads me to the conclusion that the Claimant deserves a higher amount of compensation. In reaching this conclusion, I am alive to the directions by the Court of Appeal that an award of full compensation for twelve months should be the exception to the rule and only in deserving cases (see *Kenya Airways Limited v Alex Wainaina Mbugua* [2019] eKLR, *Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR). Having regard to these factors, I enter judgment for the Claimant for compensation that is equivalent to her monthly gross salary for seven (7) months, that is to say Ksh. 1,120,000.00.
 48. I also award the Claimant interest on the amount awarded at court rates from the date of this judgment.
 49. Taking into account the partial success on the counterclaim by the Respondent, I award the Claimant 85% of the costs of the primary claim. In effect, there is no order as to costs on the counterclaim.



50. The sum of Ksh. 62,667.00 awarded to the Respondent in the counterclaim shall be set off from the sum of Ksh. 1,120,000.00 awarded to the Claimant in the main action leaving the sum of Ksh. 1,057,333.00 due to the Claimant.

51. This amount attracts interest at court rates from the date of this decision.

52. The award above is subject to the applicable statutory deductions.

DATED, SIGNED AND DELIVERED ON THE 15TH DAY OF JUNE, 2023

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

