



**Nyanumba v Nas Airport Services Limited (Cause 1164 of 2018)
[2023] KEELRC 1855 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1855 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1164 OF 2018**

JK GAKERI, J

JULY 31, 2023

BETWEEN

DAVID MOSETI NYANUMBA CLAIMANT

AND

NAS AIRPORT SERVICES LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim alleging unfair termination of employment and non-payment of dues by the Respondent.
2. The Claimant alleges that he was employed by the Respondent on 25th November, 2008 as a driver at a monthly salary of Kshs.16,947/= inclusive of house allowance which subsequently increased to Kshs.38,855/= and served faithfully and diligently until 24th November, 2015 when the Respondent terminated his employment unfairly.
3. It is the Claimant's case that the termination was actuated by a letter he had written requesting for various allowances.
4. Finally, the Claimant avers that he was neither given a notice to show cause or notice nor accorded a hearing.
5. The Claimant prays for;
 - a. A declaration that the termination of employment was unfair and unlawful.
 - b. Payment of terminal benefits amounting to Kshs.790,549.80 comprising;
 - i. Three months' salary.
 - ii. Service gratuity at 15 days each completed year.



- iii. 12 months compensation.
- iv. 34 leave days.
- v. Shift allowance, loading allowance, risk allowance, hardship allowance and sales and marketing allowance (to be computed)
- vi. Certificate of service.
- c. Such other orders or directions as the court may deem fit to meet the ends of justice.
- d. Costs of this claim.
- e. Interest at court rates.

Respondent's case

6. In its Memorandum of Response filed on 27th September, 2019, the Respondent admits that the Claimant was its employee as alleged on a renewable one year contract until 12th January, 2010 when he was appointed on permanent terms.
7. The Respondent aver that on or about 2nd October, 2015, the Claimant wrote a letter to the Respondent demanding payment of various allowances he deemed due to him and sought 26 days leave and as the Respondent considered his demands but did not resume duty and was summoned on 22nd November, 2015 to provide details of the allowances which he did and did not resume duty pending determination of his demand.
8. That he was summoned for an oral explanation on 24th November, 2015 why he was using his demand as a justification not to perform his duties.
9. That the demand was considered and found baseless.
10. It is the Respondent's case that the Claimant had another case against the Respondent ELRC No. 1297 of 2015 alleging that the Respondent had refused to let him retire and defamed him.
11. That the Claimant refused to collect his dues and certificate of service.
12. The Respondent prays for dismissal of the suit with costs.

Claimant's evidence

13. In his written statement, the Claimant states that his employment was terminated for lack of trust and making baseless claims.
14. On cross-examination, the Claimant confirmed that the Respondent was inter alia an outside catering company and he was a truck driver and had two off days and would wake up early as per the duty rota.
15. The witness testified that he was a member of KUDHEIHA which had a Collective Bargaining Agreement with the Respondent.
16. The witness confirmed that under the Collective Bargaining Agreement, he could not isolate the allowances he was claiming.
17. That he was due to resume duty on 22nd November, 2015 but did not. The witness, after a few minutes stated that he reported to work on that day.



18. He admitted that there was a meeting on 24th November, 2015 and did not work from 22nd – 24th November, 2015.
19. The Claimant admitted that whereas he filed the earlier case in July 2015, he did not claim the allowances claimed in this case and was unaware of the status of the case.
20. The Claimant further admitted that he had no evidence of extra duties, the letter of 2nd October, 2015 notwithstanding, which in any case did not specify the extra duties.

PARA 21.

That Clause 6.5 of the Collective Bargaining Agreement applied for purposes of gratuity as he had worked for 7 years.

22. The witness confirmed that he used the salary of Kshs.38,855/= based on the incentives earned and the Collective Bargaining Agreement mentioned the basic salary and house allowance.
23. The witness confirmed that the CBA referred to salary and house allowance only in the computation of gratuity and the basic pay was Kshs.19,780/= and housing allowance was Kshs.10,595/=.
24. That he rejected the payments proposed by the Respondent.
25. On re-examination, the witness testified that he was paid a shift allowance.
26. That the Respondent had not availed any evidence that it invited him to collect his duties.

Respondent's evidence

27. RWI, Mr. Gathogo's written statement rehashes the contents of the Memorandum of Response.
28. He testified that the Respondent was ready to pay service gratuity of upto 3 months amounting to Kshs.91,125/= as the Claimant worked for 7 years based on the formula prescribed by the CBA.
29. According to the witness, the Claimant's salary for purposes of computation of gratuity was Kshs.30,375/=, 34 leave days plus travel allowance, Kshs.40,658.35.
30. That the allowances demanded by the Claimant were not part of the CBA and not payable to other employees.
31. On cross-examination, the witness confirmed that the Claimant worked in the night shift as a driver, no show cause letter was issued but there was a hearing and the Claimant had been invited but had no evidence of the letter of invitation. The witness confessed that he was unaware of what transpired at the meeting and had no minutes.
32. It was his testimony that the Respondent did not respond to the letter on allowances or issue a warning letter when the Claimant failed to resume duty.
33. The witness testified that the Claimant refused to work unless he was paid the allowances and the Respondent used 13 days in computing gratuity.
34. That the witness had no computation of the Claimant's dues.
35. That although the conciliator recommended reinstatement, the Respondent declined and recommended a re-investigation of the matter.
36. He confirmed that the Claimant had no previous warnings.
37. On re-examination, the witness stated that shift allowance was payable to those on night duty.



Claimant's submissions

38. Counsel identified three issues for determination, namely; reason for termination, procedure and remedies.
39. As to whether the Respondent had a valid reason to terminate the Claimant's employment, counsel submitted that there was none as his employment was terminated after he raised a grievance which was genuine.
40. Counsel submitted that the Respondent had no valid reason to terminate the Claimant's employment.
41. That there was no evidence to show that the Claimant had stopped working till his issues were addressed.
42. That he resumed from leave and was summoned for a meeting on 24th November, 2015 and dismissed on 26th November, 2015.
43. That a letter to the Claimant notifying him that the allowances were not payable would have been sufficient.
44. Counsel further submitted that the Respondent had not discharged the burden of proof as required by the provisions of Sections 43, 45, 46 and 47 of the *Employment Act*, 2007.
45. On procedural fairness, counsel submitted that the Respondent did not comply with the mandatory provisions of Section 41 of the *Employment Act*, 2007 as there was no notice to show cause or a disciplinary hearing.
46. On remedies, counsel submitted that the Claimant's entitlement to three months' notice pay, gratuity and leave were not disputed but for the amount used for purposes of the computation. Counsel invited the court to use Kshs.38,855/= as the Claimant's salary.
47. On gratuity, counsel used 15 days in lieu of 13 days in the CBA since it was the minimum under the Act. Counsel did not specify which Act he was referring to perhaps because there is none.

Respondent's submissions

48. Counsel for the Respondent addressed the quantum of terminal benefits due to the Claimant, whether termination of the Claimant's employment was unfair and costs.
49. On the quantum, counsel agreed that there was consensus on the three prayers identified by the Claimant's counsel but for the computation.
50. That for the three (3) months' notice, the salary was the Claimant's last monthly gross salary.
51. Counsel urged that the amount to be used should be the basic salary and house allowance only as other allowances were variable.
52. Moreover, Clause 6.5(b) (i) and (ii) on gratuity was specific on salary and house allowance.
53. According to the Respondent, the Claimant's gross salary stood at Kshs.30,375/= per month.
54. The court was urged to award Kshs.91,125/= as notice pay.
55. On gratuity, counsel urged that the amount was equally Kshs.91,125/= since the computation was on "termination gratuity" as per the CBA. That the Claimant's figure was unjustified.



56. Counsel submitted that service pay under Section 35(5) of the *Employment Act*, 2007 was not synonymous with gratuity as service pay was unavailable under Section 35(6) of the Act for employees who were members of NSSF.
57. On the 34 leave days, counsel urged that the same should be based on the monthly salary comprising salary and house allowance only and amounted to Kshs.40,658.35.
58. The court was urged to adopt the figure of Kshs.40,658.35.
59. According to counsel, the total amount due to the Claimant was Kshs.216,833.35 less the statutory deductions.
60. As to whether termination was unfair, counsel urged that Sections 43, 45, 49 and 50 of the *Employment Act*, 2007 required the court to interrogate the procedure employed by the employer and reasons for termination of employment.
61. Counsel submitted that termination of the Claimant's employment was fair. That he unilaterally attempted to rewrite his contract of employment and had no justification for the allowances claimed and shift allowance was payable as and when it fell due.
62. That the Claimant's refusal to resume duty led to the meeting on 24th November 2015 when he was heard but refused to resume duty unless the allowances were paid and the termination letter made reference to it.
63. That due process was followed.
64. Counsel urged the court not to award maximum compensation.

Findings and determination

65. The issues for determination are;
 - i. Whether termination of the Claimant's employment was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
66. As regards termination of employment, the provisions of the *Employment Act*, 2007 and judicial authority are clear that for a termination of employment to pass the fairness test, the employer must demonstrate that he had a valid and fair reason to do so and conducted the termination in accordance with a fair procedure.
67. As aptly captured by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR;

“ . . . 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.”

Reasons for termination

68. It is common ground that by a letter dated 2nd October, 2015, the Claimant sought various allowances from the Respondent and proceeded on leave due to resume on 22nd November, 2015. On cross-examination, the Claimant admitted that he was not at work on that day. A minute later, he testified



- that he reported to work. Two minutes later, he testified that he was not working from 22nd November, 2015 to 24th November, 2015. That he was not given work on those days.
69. The Claimant's evidence on whether he was working from 22nd – 26th November, 2015 was too contradictory to be relied upon. The only inference the court can make is that he did not work on those days.
70. The Claimant's letter of 2nd October, 2015 originated a concatenation of events that led to termination of his employment.
71. For unexplained reasons, the Claimant did not report on duty on 22nd as envisaged and had to be invited for a meeting on 24th November, 2015 to explain why. The Claimant admitted that he attended the meeting on 24th November, 2015 with the officers identified by the Respondent.
72. The Claimant was reticent on what transpired and the Respondent tendered no demonstrable evidence of the proceedings.
73. However, the Respondent's witness testified that the Claimant was asked to explain why he was using his demand for allowances not to perform his duties but had no documentary evidence.
74. In the absence of controverting evidence, the court is persuaded that the Claimant's demands and his refusal to work may have been the agenda of the meeting since the Respondent involved the union and it was represented at the meeting.
75. The termination letter stated that;
- “In view of the foregoing we find your continued employment with this organization impossible as we have lost trust to entrust a company vehicle to you bearing in mind your level of disgruntledness with the company . . .”
76. Although the court does not doubt the genuineness of the Claimant's demand for allowances, it is unclear as to why he did not involve the union to urge his case as well if he honestly believed he had a worthy cause.
77. Copies of payslips on record show that he was a member of the union.
78. Was termination of the Claimant's employment based on the fact of having demanded allowances vide letter dated 2nd October, 2015?
79. Contrary to the Claimant's counsel submissions that the Respondent provided no evidence that the Claimant had stopped working, the Claimant admitted that fact on cross-examination.
80. Significantly, the Claimant admitted on cross-examination that he submitted his letter to the Manager on 2nd October, 2015 and the Respondent's witness gave evidence that it requested the Claimant to provide details of the allowances demanded which he did on 22nd November, 2015.
81. In the court's view, the Claimant's letter per se was not the reason for termination of employment. The Respondent was in possession of the letter from 2nd October, 2015 to 25th November, 2015 and did not terminate the Claimant's employment. The Claimant must have done something else, he refused to resume duty unless the allowances were paid.
82. In sum, the Claimant tendered no evidence as to why he was not working from Sunday 22nd November, 2015 to Wednesday 25th November, 2015 before his employment was terminated on 26th November, 2015.



83. Section 43 (2) of the *Employment Act*, 2007 provides that;
The reason or reasons for termination 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.
84. In *Naima Khamis v Oxford University Press (E.A) Ltd* [2017] eKLR, the Court of Appeal paraphrased the above provision as follows;
“ . . . reasons for termination are matters that an employer at the time of termination of contract can genuinely support by evidence and which impact on the relationship of both the employer and employee in regard to the terms and conditions of work set out in a contract. For example, poor performance, insubordination and lack of loyalty or commitment are some of the grounds . . . ”
85. In the circumstances, the court is satisfied and holds that the Respondent had a valid and fair reason to terminate the Claimant’s employment.

Procedure

86. As correctly submitted by the Claimant’s counsel and as held by the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Ltd* [2017] eKLR, the procedural precepts prescribed by Section 41 of the *Employment Act*, 2007 are mandatory and an employer is bound to observe them before effecting a termination of employment, failing which the termination is procedurally flawed and thus unfair.
87. The particular procedural precepts include explanation of the grounds on the basis of which termination of employment was being considered, the presence of a representative of the employee’s choice, entitlement of the employee to a representative, representations by the employee or the representative and hearing and considerations of the representations, if any.
88. In this case, it is patently clear that the provisions of Section 41 of the *Employment Act*, 2007 were not complied with in any respect.
89. RWI testified that he was unaware of any notice to show cause, invitation to a disciplinary hearing or minutes of the meeting.
90. The allegation and submission by the Respondent that the meeting held on 24th November was a disciplinary hearing cannot avail the Respondent for want of credible evidence.
91. For the above-mentioned reasons, it is the finding of the court that termination of the Claimant’s employment was procedurally flawed and thus unfair.
92. In conclusion, it is the finding of the court that termination of the Claimant’s employment was unfair for want of procedural propriety.
93. Having so found, I will now proceed to assess the appropriate reliefs.
- a. 12 months’ salary compensation
94. This remedy is provided for by Section 49(1)(c) of the *Employment Act*, 2007 whenever the court comes to the conclusion that the summary dismissal or termination of employment was unjustified as was in the instant case.



95. The court has taken into consideration the fact that;
- i. The Claimant had no previous warning or disciplinary matters.
 - ii. The Claimant was an employee of the Respondent for 7 years which is a reasonable length of time.
 - iii. The Claimant substantially contributed to the termination of employment. Although the Claimant alleged that he was not given any work from 22nd – 24th November, 2015, he did not testify that he was ready and willing to render services before the issue of allowances had been resolved.
 - iv. The Claimant did not appeal the Respondent’s decision or demonstrate his wish to continue serving the Respondent.
 - v. The Claimant is entitled to gratuity by virtue of Clause 6.5(b)(ii) of the Collective Bargaining Agreement between KUDHEIHA and the Respondent.
96. In the circumstances of this case, the court is persuaded that the equivalent of 3 months gross salary is fair to be computed as proposed by the Claimant’s counsel.
- b. Counsels are in agreement that the Claimant is entitled to;
 - i. 3 months’ salary in lieu of notice
 - ii. Service gratuity and
 - iii. 34 days leave.
97. The only contentious issues is how to compute the amount due to the Claimant.
- i. In lieu of notice pay
98. Neither the Claimant’s contract of employment nor the CBA provides guidance on how much is payable as notice.
99. In the circumstances, the court is guided by the provisions of Section 49(1)(a) of the [Employment Act, 2007](#) that;
- “The wages which the employee would have earned had the employee been given the period of notice to which he was entitled under the Act or his contract of service.”
100. Needless to emphasize, the terms of the CBA are an integral part of the contract of service.
101. Judicial authority is clear that gross salary or wage means the monthly basic salary and allowances as per the contract of service. (See *Banking, Insurance & Finance Union (Kenya) v Maisha Bora Sacco Society Ltd* [2018] eKLR as well as *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR.)
102. In the upshot, the Claimant is awarded 3 months gross salary as pay in lieu of notice as proposed by the Claimant’s counsel.
- ii. Service gratuity



103. As correctly submitted by the Respondent's counsel, service pay and service gratuity are not synonymous simply because service pay is statutory while the gratuity is "a gratuitous payment for services rendered . . . It is paid to an employee or his estate by the employer either at the end of the contract or upon resignation or retirement or upon death of the employee, as a lumpsum amount at the discretion of an employer. . ."
104. (See *Bamburi Cement Ltd v William Kilonzi* [2016] eKLR).
105. It is exclusively contractual as it is in this case and the same shall be computed in accordance with the provisions of Clause 6.5(b)(ii) of the Collective Bargaining Agreement on record.
- iii. 34 leave days
106. The amount due shall be computed at the salary of Kshs.38,855/=.
- c. Other allowances claimed by the Claimant such as shift, loading, hardship and marketing sales
107. As the Respondent's counsel correctly submitted, the Claimant's demand for these allowance was a unilateral attempt to alter the terms of the contract of employment between him and the Respondent and as adverted to elsewhere in this judgement, he did not involve the union. More significantly, however, the Claimant tendered no evidence of his entitlement to the allowances other than shift which was being paid as appropriate.
108. The Claimant adduced no evidence to prove that he was also a loader, was undergoing any hardship by virtue of his employment, was exposed to risk of attack or sickness or was the Respondent's marketing agent.
109. The copy of the Delivery note on record evidences a delivery only.
110. The claim for allowance fails on account of the provisions of Section 107(1) of the *Evidence Act*.
The prayer is declined.
- d. Certificate of service
111. The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*, 2007.
112. Although, the Respondent provided no documentary evidence that it had invited the Claimant to collect his dues, he was aware and testified that he rejected the same.
113. In the upshot, judgement is entered for the Claimant against the Respondent as follows;
- a. Declaration that termination of the Claimant's employment was unfair.
- b. 3 months gross salary in lieu of notice.
- c. Equivalent of three months gross salary as compensation.
- d. Service gratuity as per the Collective Bargaining Agreement.
- e. 34 leave days.
- f. Certificate of service.
- g. Costs of this suit.
- h. 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 31ST DAY OF JULY 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

