



**Nandwa v Asterisk Limited (Cause 1243 of 2018)
[2023] KEELRC 1876 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1876 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1243 OF 2018**

JK GAKERI, J

JULY 27, 2023

BETWEEN

HUDSON NANDWA CLAIMANT

AND

ASTERISK LIMITED RESPONDENT

JUDGMENT

1. The Claimant initiated this suit by a Statement of Claim filed on July 24, 2018 alleging wrongful dismissal by the Respondent.
2. The Claimant avers that he was employed by the Respondent in March 2018 as a Technical Service Engineer (Biomedical Engineer) and became the Head of Department after 3 years until May 2018 when he was dismissed from employment.
3. The Claimant states that in April 2018, his daughter was diagnosed with andenioch as a consequence of which he was given permission to attend to her and reported back to work after his daughter was operated and discharged.
4. That on May 2, 2018, the Director, Mr. Dipen Rayani told him things had to change and was served with a summary dismissal letter dated May 3, 2018.
5. The Claimant avers that his dismissal was occasioned by a salary increment they had been negotiating since April 2017 approved in November 2017 but did not materialise.
6. The Claimant prays for;
 - a. General damages for;
 - i. Breach of contract.
 - ii. Violation of the right to fair administrative action.



- iii. Discrimination of the Claimant.
- iv. Subjecting the Claimant to unfair labour practices.
- v. Salary arrears for April 2018 Kshs.150,000/=.
- vi. Costs of this claim and interest thereon.
- vii. Any other and further relief that the court may deem fit and just to grant.

Respondent's case

7. The Respondent admits that the Claimant was its employee earning a salary of Kshs.150,000/= per month.
8. It avers that the Claimant exhibited insubordination by refusing to sign a contract of employment despite reminder, absent without permission, or exceeding the leave days granted and failure to adhere to working hours.
9. It is the Respondent's case that in March 2018, he applied for a short leave but did not return to work until April 2018, 21 days later.
10. That several clients had complained about his reliability.
11. That cash flow challenges could not allow salary increment as promised.
12. Finally, the Respondent avers that the Claimant's employment was terminated on May 3, 2018 for gross misconduct and insubordination.

Claimant's evidence

13. On cross-examination, the Claimant admitted that he had requested for permission to seek medical treatment for his daughter and no timeline had been given. It was his testimony that he would return when his daughter received proper medical attention.
14. The witness confirmed that the leave application form record indicated that he had been accorded leave for only 5 days from March 13, 2018 to March 20, 2018.
15. That on March 20, 2018, the Claimant wrote to the Director, Mr. Dipen Rajani informing him that his daughter was unwell and he would not be available until she received proper check-up from an ENT Specialist.
16. Surprisingly, the Claimant could not recall when he reported back to work after the 5 days leave.
17. The witness confirmed that he did not sign a contract of employment and had no dismissal letter which contradicted his evidence-in-chief that he had been served with a summary dismissal letter on May 3, 2018 at 4.00 pm.
18. On re-examination, the Claimant testified that he was employed in 2008 and was out of the office for more than 2 weeks and had indeed refused to sign the contract of employment.

Respondent's evidence

19. On cross-examination, Mr. Dipen Rajani confirmed that Claimant refused to sign the contract of employment sometime in August/September 2016.



20. That the Claimant was absent from the work place without permission for a long time after securing 5 days leave only.
21. The witness admitted that he had no evidence as to the date the Claimant reported back or was issued with warning letters.
22. The witness admitted that no disciplinary proceedings were conducted.
23. On re-examination, the witness testified that the Claimant's email dated March 20, 2018 did not indicate when he intended to resume duty.

Claimant's submissions

24. Counsel for the Claimant submitted on whether termination of the Claimant's employment was unfair and entitlement to the reliefs sought.
25. As regards termination, counsel relied on the provisions of Sections 43, 45(2) and 47(5) of the [Employment Act](#), 2007 to urge that it was the duty of the Respondent to prove that termination of the Claimant's employment was fair. Reliance was made on the decisions in *British Leyland UK Ltd V Swift (1981) I.R.L.R. 91*, *Co-operative Bank of Kenya Ltd V Banking, Insurance 7 Finance Union (2017) eKLR*.
26. Counsel submitted that the Respondent had not demonstrated the validity and justification of termination of the Claimant's employment.
27. On procedural fairness, counsel relied on the provisions of Section 41 of the [Employment Act](#) and the decision in *David Gichana Omuya V Mombasa Maize Millers Ltd (2014) eKLR* to urge that the Claimant had not been given an opportunity to defend himself.
28. On the reliefs sought, counsel submitted that the Claimant was seeking three month's salary in lieu of notice, salary for April 2018 and 12 months compensation.

Respondent's submissions

29. Counsel for the Respondent submitted on whether termination of the Claimant's employment was unlawful and relied on the provisions of Section 45 of the [Employment Act](#) to underscore the requirements of a fair termination of employment.
30. Counsel submitted that the Claimant indeed admitted having been away for some time which justified the summary dismissal under Section 44(4)(a) of the [Employment Act](#) as he had no leave from 20th March to May 3rd 2018.
31. Counsel urged that termination of the Claimant's employment was lawful and the reliefs sought were unmerited.

Determination

32. The issues for determination are;
 - i. Whether termination of the Claimant's employment was unfair or unlawful.
 - ii. Whether the Claimant is entitled to the reliefs sought.
33. On termination, parties have adopted opposing positions. While the Claimant's counsel submitted that it was unfair for want of a valid and justifiable reason and fair procedure, counsel for the



Respondent submitted that the Respondent had a valid reason to summarily dismiss the Claimant from employment.

34. Needless to belabour, the provisions of Sections 41, 43, 44, 45 and 47(5) of the *Employment Act*, 2007 are unambiguous that for a termination of employment to pass the fairness test, the employer must have had a valid and fair reason to terminate the employee's employment and must have done so in accordance with a fair procedure.
35. Courts have affirmed the law in legions of decisions such as *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR where Ndolo J. aptly captured the twin test for a fair termination of employment and *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR where the Court of Appeal affirmed the twin test.

Reason for termination

36. Section 43(1) of the *Employment Act*, 2007 provides that;

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or 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.”

37. In ascertaining whether the employer had a valid and fair reason to terminate the employee's contract of employment, courts are generally enjoined to apply the standard of a reasonable employer as explained in *British Leyland (UK) LTD v Swift* (Supra), cited by the Claimant's counsel, where the court stated;

“The correct test is; was it reasonable for the employer to dismiss him? if no reasonable employer would have dismissed him, the dismissal was unfair but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness within which an employer might reasonably take one view; another quite reasonably take a different view . . . If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair though some other employers may not have dismissed him.”

38. The foregoing propositions notwithstanding, Section 43(2) of the *Employment Act*, 2007 provides that;

“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.”

39. I will now proceed to apply the foregoing provisions and principles of law to the facts of the instant case.
40. The summary dismissal letter dated May 3, 2018 accused the Claimant of rudeness towards the employer and the Respondent relied on Section 44(4)(d) of the *Employment Act*, 2007 to justify the summary dismissal.
41. Although the Respondent's witness adduced no evidence of any confrontation, the Claimant testified that on May 2, 2018, Mr. Dipen Rajani, RWI came to the Claimant's department and demanded to know why the Claimant had not gone to his office to see him, to which the Claimant replied that he was busy on the computer going through emails and obtaining briefings from Engineers working under him.



42. That Mr. Dipen Rajani told the Claimant to his face that things had to change in that office and walked away.
43. The court's inference is that the Claimant's response could have infuriated the director as he could not envision how an employee who had not been reporting to the work place without leave or notifying the employer would assume that all was well.
44. The Claimant admitted that he received a summary dismissal letter on the following day, May 3, 2018 at 4 pm, a fact he contradicted on cross-examination.
45. Evidence on record reveals that the Claimant applied and was granted 5 days leave effective March 13, 2018 to March 20, 2018 and was due to resume duty on March 21, 2018.
46. However, on March 20, 2018 at 5 pm, the Claimant wrote an email to the Director, Mr. Dipen Rajani informing him that his daughter was unwell and he would not be available "until she gets proper check-up from ENT Specialist."
47. The email is unambiguous that the Claimant was not applying for extension of leave. Similarly, the email had no date as to when he planned to resume duty.
48. On cross-examination, the Claimant admitted that he was absent from the work place for more than two weeks.
49. More puzzling, the Claimant could not even recall when he resumed duty, the fact that the Respondent led no evidence on when he resumed notwithstanding.
50. From the evidence on record, there is no indication that the Claimant resumed duty before May 2, 2018. This is evidenced by an email from RWI to the Claimant dated April 13, 2018 at 11.26 am.
51. The contents of the email are clear that clients had been complaining about the department headed by the Claimant. The email elicited no response from the Claimant.
52. The evidence on record lays it bare that the Claimant was not at the place of work for more than 2 weeks while not on leave.
53. In the court's view, the Claimant's email dated March 20, 2018 informing Mr. Dipen Rajani that he would be unavailable to work until his daughter obtained proper check up from an ENT Specialist was analogous to notifying the employer that he will be available to work for the employer at his convenience. The court finds the email exceedingly audacious. The Claimant was absent from work for over one (1) month without permission of the employer.
54. Flowing from the foregoing, it is the finding of the court that the Respondent has proved on a balance of probabilities that it had a valid and fair reason to terminate the Claimant's employment.

Procedure

55. Needless to emphasize, Section 41 of the *Employment Act*, 2007 prescribes the procedural attributes of a fair termination of employment and as held in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2018) eKLR, the elaborate process in Section 41 is mandatory, for a the termination of employment is to pass muster.
56. Courts have isolated the essential elements of Section 41 of the *Employment Act*, 2007 (see *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR).



57. In the instant case, the Respondent's witness admitted on cross-examination that the Respondent neither invited the Claimant nor conducted any disciplinary proceedings before terminating his employment.
58. The absence of a notice to show cause and a hearing suggest that the Claimant was not accorded a fair hearing to defend himself and it follows that the termination of his employment was procedurally flawed and thus unfair.

Appropriate reliefs

59. Having found that termination of the Claimant's employment was unfair for want of procedural propriety, the court proceeds as follows;

a. General damages for

- i. Breach of contract
 - ii. Violation of the right to fair administrative action and
 - iii. Discrimination
60. The Claimant adduced no evidence of breach of any contract, discrimination or violation of the right to fair administrative action otherwise than in the non-compliance with the procedural precepts in the termination of his employment.
 61. Neither the undated written statement nor the oral evidence adduced in court established the factual basis of the claim for general damages.
The claim is unmerited and is dismissed.

b. Salary arrears for April 2018

62. Although counsel for the Claimant submitted on this issue as one of the reliefs sought, the Claimant led no evidence.
63. Neither the written statement nor the oral evidence availed in court make reference to any unpaid salary for April 2018.
The prayer is declined for want of supportive evidence.

c. Compensation for unlawful termination of employment

64. Although the Claimant did not pray for this remedy, he proved on a preponderance of probabilities that termination of his employment was procedurally flawed.
65. Relatedly, under prayer (d), the Claimant sought any other or further relief the court might deem fit and just to grant.
66. Though discretionary, the remedy under Section 49(1)(c) of the *Employment Act* is available to Claimants who demonstrate that termination of the contract of employment was unjustified and the quantum of compensation is determined on the basis of the parameters enumerated in Section 49(4) of the Act.
67. In this case, the court has taken into consideration the following;



- i. The Claimant was an employee of the Respondent from June 2008 to 3rd May, 2018, a duration of about 10 years which is a long time.
 - ii. The Claimant had not recorded case of misconduct or indiscipline at work and had attended workshops locally and outside the country by virtue of his employment by the Respondent.
 - iii. The Claimant substantially contributed to the termination of the employment contract.
 - iv. The Claimant did not appeal the Respondent's decision nor indicate his readiness to continue as an employee of the Respondent.
 - v. The Claimant admitted to having refused to sign the employment contract without assigning reasons.
68. In the circumstances of this case, the court is satisfied that the equivalent of one (1) month's salary is fair.
69. In conclusion, judgment is entered for the Claimant against the Respondent as follows;
- a. Equivalent of one (1) month's salary, Kshs.150,000/=.
 - b. Costs of this suit.
 - c. 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 27TH 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



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