



Wanyonyi v E-Momentum Interactive Systems (Employment and Labour Relations Cause 2459 of 2017) [2023] KEELRC 1824 (KLR) (26 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1824 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2459 OF 2017**

**AN MWAURE, J
JULY 26, 2023**

BETWEEN

DAVID BARASA WANYONYI CLAIMANT

AND

E- MOMENTUM INTERACTIVE SYSTEMS RESPONDENT

JUDGMENT

1. The claimant filed a claim dated December 7, 2017.

Claimant's case

2. He claims he was employed by the respondent as a marketing executive at a gross salary of Kshs 40,000/- per month from September 23, 2013. He was put on a 3 months' probation.
3. Claimant says he was terminated from employment with no valid reason and un procedurally. He says his NSSF deductions were not remitted.
4. The claimant prays for reinstatement and the other prayers listed in the claim.

Respondent's Case

5. The respondent filed a response dated February 12, 2015. He admits the claimant was employed as a tele sale executive. He denies they dismissed the claimant but avers claimant was given opportunity to show cause why his employment should not be terminated and he totally failed to show cause.
6. He also says the respondent on March 23, 2015 reported to work late without permission and when asked for an explanation he became rude. He says claimant consistently used to go to work late and so his termination was lawful.



7. He avers claimant was called for a disciplinary meeting and so he denies that he owes the claimant any compensation.
8. He finally avers the claimant's suit is a demonstration of bad faith and lacks merit and so he prays the same be dismissed with costs.
9. The respondent did not give evidence in court and the respective Parties did not file their written submissions.
10. The claimant however gave his evidence in chief in court on March 23, 2023 and actually retaliated what had been contained in the claim.

Determination

11. The claimant alleges unlawful and unprocedural termination of his employment. The issue for determination is whether the claimant was unlawfully and un procedurally terminated and whether he deserves the prayers in his claim.
12. The law pertaining to employment is as well provided in section 41, 43, 45 and 47 of the [Employment Act](#) 2007. In particular section 45(1) provides that for the employer to terminate an employee he must demonstrate he has a valid reason for doing so. The respondent in his response does state that the claimant was a habitual late comer to work and when he was asked for an explanation he apparently became rude. The respondent did not demonstrate how he became rude except to say that the claimant stated he needed to go to the field just because of the nature of his work before reporting to the office.
13. The law as well provided that for any claim arising out of termination of a contract the employer shall be required to prove reason or reasons for the termination and where the employer fail to do so, the termination shall be deemed to have been unfair within the meaning of section 45 of [employment act](#).
14. As well section 41(1) of the [employment act](#) provide that:

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.
15. Flowing from the above the respondent did not satisfy the court that he had a valid ground or reason to terminate the claimant. Furthermore the claimant was not taken through disciplinary process to explain himself in the presence of a fellow worker of his choice or a shop floor union representative of his choice.
16. It is sacrosanct law that for termination to pass the fairness test, it ought to be shown that there was not only substantive justification for the termination but also procedural fairness ([Walter Ogal Onuro v Teachers Service Commission](#) Cause No 955 of 2011).
17. The court is convinced that the respondent failed to prove valid grounds to terminate the claimant from his employment and failed to put him through disciplinary process. The claimant proved his case for unfair termination and so judgment is entered in his favour.
18. He is entitled to the under listed remedies.
 - a. Reinstatement is not allowed since it is over three years since he was terminated.



- b. Leave due and not taken no specifics and so is disallowed.
- c. One month salary in lieu of notice Ksh 40,000/-
- d. Refund of statutory deductions not remitted and as there are no specifics the same is disallowed.
- e. Compensating for unlawful termination @ 3 months x 40,000 = 120,000
- f. Total award is kshs 160,000/- plus interest at court rates form date of judgment till full payment.
- g. Costs follow event and so claimant is awarded costs.

19. Orders accordingly.

Dated, Signed and Delivered virtually in Nairobi this 26th day of July, 2023.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

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