



**Njengi v Powerstar Supermarket Kikuyu Limited (Cause
751 of 2018) [2023] KEELRC 1962 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1962 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 751 OF 2018
NZIOKI WA MAKAU, J
JULY 25, 2023**

BETWEEN

MOSES MURIUKI NJENGI CLAIMANT

AND

POWERSTAR SUPERMARKET KIKUYU LIMITED RESPONDENT

JUDGMENT

1. The claimant filed this suit against the respondent for the unlawful, wrongful and unfair dismissal from his employment. He sought Judgment against the respondent for:
 1. A declaration that the dismissal of the claimant is unlawful, wrongful and unfair.
 2. Pay in lieu of termination notice – Kshs. 45,000/-
 3. Pay in lieu of leave – Kshs. 121,153.84
 4. Pay in lieu of public holidays – Kshs. 58,846.18
 5. Housing allowance – Kshs. 270,000/-
 6. Overtime – Kshs. 1,398,894.85
 7. Compensation – Kshs. 540,000/-
 8. Certificate of Service
 9. Costs of this cause
 10. Interest on (2) and (9) hereinabove



11. Any other relief this honourable court may deem fit and just to grant.
2. The claimant averred that he was employed by the respondent on November 28, 2014 as a Shop Attendant and deployed to its Kitengela Supermarket. However, that he was not issued with a contract of employment and his starting gross monthly salary was Kshs 14,000/-. He further averred that he was later transferred to the respondent's Jambo Supermarket situate in Ruiru in the position of Assistant Manager on or about August 2017. That after about a month, he was again transferred to its Supermarket in Kikuyu in the position of Manager. It was the claimant's averment that he worked well with the respondent without any record of indiscipline and was diligent and dutiful in his duties. However, on March 24, 2018, he reported to work as usual and learnt at around 10.00am through his assistant that the respondent's Director had suspended him. That upon seeking audience with the Director, he was asked why he had not been paying rent for the premises to him and directed to proceed on suspension as instructed.
3. The claimant further averred that he subsequently visited the Director's office at Kasarani on two occasions and on the second visit on March 31, 2018, the said Director informed him that the Respondent had dismissed him from employment as at March 24, 2018. That the Respondent's General Manager thereafter removed his cellphone's number from the respondent's WhatsApp platform for its Managers and at the end of March 2018, the respondent only paid him for the days worked in March 2018. That at the time of termination, he was earning a monthly gross salary of Kshs. 45,000/- effected through the bank but the respondent never used to issue him with pay slips. In addition, the respondent did not issue him with a certificate of service upon dismissal. The claimant's averment was that the respondent did not afford him an opportunity to be heard before the termination and that he was not informed the reason, if any, for the dismissal. He averred that he did not commit any offence to warrant his dismissal and that the respondent neither issued him with a termination notice nor paid him in lieu thereof. Further, that he was neither housed by the respondent nor paid house allowance throughout his employment and that there was no agreement between him and the Respondent that his salary would be consolidated. He also stated that he worked during public holidays for the entire period of employment and was not allowed equivalent time off or paid in lieu thereof and that he was further never allowed to proceed on leave or paid in lieu thereof. That despite there being an agreement between himself and the respondent that working hours would be from 8.00am to 5.00pm and the respondent directing him to report at 7.15am and leaves at 10.00pm, he was never paid overtime.
4. In its Statement of Defence dated March 18, 2019, the Respondent averred that the present suit had been filed against the wrong party since the claimant was employed by Powerstar Supermarket Kitengela Limited. Without prejudice to the foregoing, the respondent averred that the claimant was dismissed for coming to work while drunk, which had become a habit. Further, that the claimant was arrogant and disrespectful to his employer and had been given several warnings before his dismissal. It argued that the claimant's dismissal was thus lawful and justified and that he was not entitled to any benefits. The respondent also denied that the claimant earned Kshs. 45,000/- per month or that he worked on public holidays as alleged. It averred that the claimant was not entitled to house allowance as he was earning a consolidated salary and that there was no outstanding leave owed to him as he was paid his leave days every year. It asserted that the claimant was not entitled to the prayers sought in the Memorandum of Claim and prayed for the same to be dismissed with costs.
5. The respondent filed a Witness Statement dated March 18, 2019 by Mr. Isaac Mbui Maina, who stated that when the Claimant was suspended from employment on March 24, 2018 because he had come to work while drunk. Mr. Maina denied that the claimant ever worked for extra hours and asserted



that the claimant could not claim any compensation from the Respondent as his dismissal was lawful and justified.

6. In evidence before court, the claimant confirmed under cross-examination that he was seeking payment for unpaid leave not paid and confirmed that his salary was paid. In regard to his claim on the matter of Public Holidays, he stated that the company had the Register and that he had shown the days and hours he worked overtime. He further testified that he had attached a bank statement to show that he was paid a salary of Kshs. 45,000/- a month. The Defence case was marked as closed as they failed to appear before court for hearing of their case.

Claimant's Submissions

7. The claimant submitted that the issues for determination before this court are whether his dismissal was lawful and fair; and whether he merits the reliefs sought for. He submitted that section 45(1) of the *Employment Act* provides that no employer shall terminate the employment of the employee unfairly while section 45(2) provides that a termination of employment is unfair if the employer fails to prove that the reason(s) for termination are valid and fair and that the employment was terminated in accordance with fair procedure. Further, section 43 of the Act provides that where the employer fails to prove the reasons for termination, the termination shall be deemed to have been unfair within the meaning of section 45.
8. It was the claimant's submission that his evidence before this court remains unchallenged as the respondent did not call any witness to testify against him. That the allegations that he was dismissed for habitually coming to work while drunk or that he was arrogant and disrespectful were therefore not proved before this court. Moreover, the respondent did not demonstrate that it at any given time instructed him to pay rent to the Director and he had refused to do so. He cited the case of *Nicholas Muasya Kyula v Farmchem Ltd* [2012] eKLR in which the court held that it was not sufficient for an employer to make allegations of misconduct against the employee as the employer is required to have internal systems and processes of undertaking administrative investigations and verifying occurrence of misconduct before deciding to terminate employment. The claimant urged the court to find that the Respondent dismissed him for no reason and or that it did not have a valid and fair reason to dismiss him from employment.
9. The claimant further submitted that he was not granted an opportunity to be heard as provided under section 41 of the *Employment Act* and that he was not issued with a show cause letter or invited for disciplinary hearing. That courts have been clear in finding that the said provisions with regard to fair procedure are mandatory and a termination becomes procedurally unfair where the same is not followed. He cited the case of *Peter Apollo Ochieng v Amedo Centre Kenya Limited* [2016] eKLR and submitted that this honourable court has variously held that where an employer fails to grant an employee an opportunity to be heard, the termination is procedurally unfair and that there is no reason to examine whether the reason for dismissal is valid and fair. He cited the cases of *Peter Onyango Nyabongo v Citadelle Security Limited* [2015] eKLR and *Patrick Abuya v Institute of Certified Public Accountants of Kenya (ICPAK) & another* [2015] eKLR). He urged this Court to find that there was neither valid and or fair reason for dismissal nor was he granted an opportunity to be heard.
10. As to whether he merited the reliefs sought, the Claimant submitted that he was entitled to payment of termination notice as under section 35(1) of the *Employment Act* having found that he was unlawfully, wrongfully and unfairly dismissed. That his claim for payment in lieu of leave is merited under section 28(1)(a) of the Act and that the Respondent is obligated to keep records in respect of leave pursuant to section 74(1)(f) of the Act. He relied on the case of *Lawi Wekesa Wasike v Mattan Contractors Limited* [2016] eKLR wherein the Court observed that it was left to believe the evidence of the claimant as the



respondent had not provided any record as mandatorily required of it. Further, it was the claimant's submission that his entitlement to annual leave including public holidays was also pursuant to section 10(3)(a)(i) of the *Employment Act* on the same being a term in a contract of service, which he was however not issued with. That in the Lawi Wekesa case (supra), the court found that the employee's statement must be given more weight where the respondent did not cause a written contract to be drawn. The claimant thus urged this Court to consider the claim for Public Holidays on the premises that there are ten (10) public holidays in each year and to allow the same as prayed. On Housing Allowance, the claimant submitted that the same is merited under section 31(1) of the *Employment Act* and should be allowed as prayed. That the employer is obligated to keep a written record of all its employee's particulars of accommodation under section 74(1)(i) of the Act. That where wage rates are deconsolidated, the employer should show the particulars of the housing allowance paid to the employee. He further submitted that since the respondent failed to produce a contract of employment before this court to disapprove his testimony, this court should find that his salary was not consolidated with an element to be used for housing and that he had not entered an agreement with the respondent for consolidation of his salary.

11. On the claim for overtime, the claimant submitted that the respondent's failure to allow him time off or pay him for the hours worked beyond normal working hours amounts to unfair labour practice within the meaning of article 41 of the *Constitution* of Kenya. That a muster roll or clocking records would have resolved this issue but the respondent chose not to produce records to disapprove his claim. He relied on the case of *Mesback Kii Ikulume v Prime Fuels Kenya Limited* [2013] eKLR in which the court observed that employers' responsibility to keep records is because some of the claims such as overtime and pay for work done on public holidays have a statutory foundation on what employees are entitled to as of right. He urged the court to find that he worked beyond normal working hours and thus merits payment of overtime as prayed. With regard to his prayer for compensation, the claimant submitted that he merits the same having demonstrated unfair and unlawful dismissal from employment by the Respondent. He referred the court to section 49(1)(c) as read with section 50 of the *Employment Act* on the award of compensation being a maximum of 12 months' wages or salary and urged the court to find that this is a fit case for award of the same. He also prayed for a Certificate of Service pursuant to section 51(1) of the *Employment Act*. In the upshot, that he had proved his case on a balance of probabilities. The claimant finally submitted that having incurred cost in instituting and maintaining this suit, the court should find that he merits the award of costs and interest from the date of filing suit to the date of payment in full. The respondent did not file any submissions.
12. The claimant sued Powerstar Supermarket Kikuyu Limited. The respondent averred the employer of the claimant was Powerstar Supermarket Kitengela Limited. Who was the employer of the claimant? Powerstar Supermarket Kitengela Limited or Powerstar Supermarket Kikuyu Limited? The claimant's NSSF statement indicated his employer as Powerstar Supermarket Kikuyu Limited and in the response by the respondent no evidence was attached to indicate the employer to be other than what the claimant pleaded. As such, I find the claimant impleaded his employer and there is no doubt that he sued the correct party.
13. The claimant was notified on March 31, 2018 by one of the respondent's Director's who informed the claimant that the respondent had dismissed him from employment effective March 24, 2018. The Respondent only paid the claimant for the days worked in March 2018. At the time of termination, the claimant was earning a monthly gross salary of Kshs. 45,000/- paid directly to his bank. The Respondent did not issue the claimant with a certificate of service upon dismissal. The claimant was not afforded an opportunity to be heard before the termination neither was he informed of the reason, if any, for the dismissal. From evidence adduced, there was no evidence that the claimant committed any offence to warrant his dismissal. The respondent did not undertake any hearing to ascertain wrong



doing on the part of the claimant. The manner of dismissal was not in keeping with the dictates of employment law and the rules of natural justice.

14. As held in the case of *Mesback Kii Ikulume v Prime Fuels Kenya Limited* (*supra*) it is the employer's responsibility to maintain employment records in terms of section 74 of the *Employment Act*. The claimant also asserted that he was not housed by the respondent nor was he paid house allowance throughout his employment. He stated that there was no agreement between him and the respondent that his salary would be consolidated. The claimant acquiesced to non-payment of house allowance for the entire duration of his contract and the only period for which he can recover is the last year as the non-payment of house allowance was a continuing wrong. He similarly will only recover one month's pay as leave since he also never sought payment in lieu of leave during the pendency of his employ. The claimant did not particularise his claim for overtime and as such the same is not payable as it is impossible to ascertain on what dates he worked overtime, how many hours were worked on average etc. As the claim was vague he will not recover.
15. In the final analysis I enter judgment for the claimant against the respondent for:-
 - a. A declaration that the dismissal of the claimant is unlawful, wrongful and unfair.
 - b. One month's salary in lieu of notice – Kshs. 45,000/-
 - c. House allowance for 12 month's – Kshs. 81,000/-
 - d. Kshs. 51,570/- being one month's salary inclusive of house allowance as payment in lieu of leave.
 - e. Compensation for unfair and unlawful termination at 6 months – Kshs. 310,500/-
 - f. Certificate of service.
 - g. Costs of the suit.
 - h. Interest on the sums in (b), (c) (d) and (e) above at court rates from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY 2023

NZIOKI WA MAKAU

JUDGE

