



**Mbaka v Athi River Shalom Hospital (Cause 216 of 2018)  
[2023] KEELRC 1868 (KLR) (24 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1868 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 216 OF 2018  
NZIOKI WA MAKAU, J  
JULY 24, 2023**

**BETWEEN**

**ALEX NYASAKA MBAKA ..... CLAIMANT**

**AND**

**ATHI RIVER SHALOM HOSPITAL ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this claim against the Respondent for unfairly/unlawfully dismissing him from employment and non-payment of his due terminal benefits. He prayed for Judgment against the Respondent for:
  - a. A declaration that the Claimant's dismissal from the Respondent's service was unfair and unlawful and totally failed to follow due process.
  - b. An order for the Respondent to pay the Claimant his terminal dues and compensatory damages totalling Kshs. 1,823,850/- with interest thereon.
  - c. The Respondent do pay the Claimant costs of this Cause plus interest thereon.
  
2. The Claimant averred that he was employed by the Respondent as a Chef from 24<sup>th</sup> October 2006 and was later promoted to the position of Head of Hospitality Department. That his last monthly salary was computed at Kshs. 16,500/- and that he was never provided with a housing facility or paid house allowance in lieu thereof. It was the Claimant's averment that on 19<sup>th</sup> August 2017, he proceeded on his weekly off day, which usually was on Saturdays. However, at around 7.30pm of the said Saturday while at home, he received a phone call from the Deputy Director Mrs. Benta ordering him to immediately report to the Respondent's premises to which he obliged. That upon arrival, Mrs. Benta took him to the kitchen where other employees in the Hospitality Department had gathered. He saw four of his colleagues holding on to what they had stolen while others were suspected to have stolen some assorted



items that had been placed on a table. That a Police Officer arrived thereafter and interrogated the four employees who were then told to report to Athi River Police Station the following day. That the said employees were detained and arraigned in court the following day and then later released on a Kshs. 5,000/- cash bail each.

3. He further averred that he reported to work as usual on 21<sup>st</sup> and 22<sup>nd</sup> August 2017 and that on 23<sup>rd</sup> August 2017, he was handed a Suspension Letter and a letter inviting him for a hearing before the Disciplinary Committee on 28<sup>th</sup> August 2017. He attended the hearing and answered questions to the Respondent's satisfaction but was further called on 29<sup>th</sup> August 2017 and advised to see the HR Manager on 30<sup>th</sup> August 2017, to which he obliged and was handed a termination letter. The Claimant's position was that the Respondent's action of issuing him with a summary dismissal letter amounted to unlawful and unfair dismissal of employment because:
  - a. The Claimant had done nothing wrong to warrant the dismissal;
  - b. No notice was issued to the Claimant before the decision to summarily dismiss him was reached;
  - c. No plausible reason was given for the Claimant's dismissal;
  - d. Due process was ignored in the haste to summarily dismiss the Claimant; and
  - e. The decision to dismiss the Claimant was harsh, inhumane, unwarranted and unjustified considering he had served the Respondent with dedication and without blemish for over 10 years.
4. The Claimant thus consequently sought before this Court his due terminal benefits being unpaid house allowance for the entire duration of service, overtime for 3½ extra hours worked during the period and a Certificate of Service. He further claimed compensatory damages at 12 months' gross salary for the unfair and unlawful dismissal, which he averred the Respondent failed to pay him despite issuing it with demand and notice of intention to sue.
5. The Respondent filed a Response to Statement of Claim averring that the Claimant was paid a consolidated basic salary of Kshs. 16,500/- that catered for all allowances. Further, that the Claimant was not diligent in his work, as he had received warning letters dated 16<sup>th</sup> September 2012 and 12<sup>th</sup> October 2014. That the Claimant was so ineffective at his work that on 16<sup>th</sup> September 2012 the management was forced to split his department into production and service sub-departments with the Claimant left to manage the production sub-department. That however, the Claimant was still dismally poor at his work leading to many verbal warnings that culminated in his suspension on 12<sup>th</sup> October 2014 pending a disciplinary hearing. It further averred that as the Head of Department, it was the Claimant's duty to, inter alia, maintain proper records and report to the management any breakages, difficulties or theft, as per the list of duties set out under his Job Description for the role, against which he signed. That it was also his duty to have in place a system that would be able to record all consumables and stocks of supplies in his department and be able to track their usage in order to avoid theft and wastage. The Respondent contended that its investigations however revealed blatant and wanton pilferage in the Claimant's department that had been going on for a long time under the Claimant's watch and were unreported. That the Claimant had thus wilfully neglected to perform his duties, failed and/or refused to obey a lawful and proper command from his supervisor, was negligent in carrying out his duties, and was complicit in and/or had committed the offence of theft against the Respondent. That the said transgressions brought the Claimant under the ambit of summary dismissal as set out in law.



6. It was the Respondent's averment that on 22<sup>nd</sup> August 2017 it subsequently issued the Claimant with a Notice to face a Disciplinary Committee, which he responded to through his hand-written letter dated 22<sup>nd</sup> August admitting to theft having taken place but giving no proper explanation for the theft occurring in his department. The Respondent's stance was that it accorded the Claimant a fair hearing on 28<sup>th</sup> August 2017 following which a decision was reached to terminate his services after he was unable to properly explain his actions. That the termination letter, issued to the Claimant on the said 28<sup>th</sup> August 2017, was elaborate enough and concluded that the summary dismissal was due to the Claimant's poor performance. In addition, the Respondent averred that the Claimant was issued with a Certificate of Service and paid his full terminal benefits calculated at Kshs. 38,596/-. That the Claimant either took all his leave days or was paid for them and that his work involved many breaks and rest times especially when on night shift, which in any event was compensated for in his aforementioned consolidated salary. The Respondent denied being issued with any demand or notice of intention to sue and prayed for the Claimant's Memorandum of Claim to be dismissed with costs.
7. The Respondent also filed a Witness Statement dated 27<sup>th</sup> June 2022 by its HR Manager, Ms. Jane Nyakio Okatch, who asserted that the Claimant was given many opportunities to improve in vain and that he retained his employment owing to the desire to give him chances to improve. She stated that on 19<sup>th</sup> August 2018, several staff members were found to have stolen supplies from the kitchen and their testimonies demonstrated that the thefts had been going on for a long time under the Claimant's watch. Further, that the Claimant showed no remorse for his inaction, lapse of judgment, or neglect of duty. She also asserted that housing allowance and overtime pay were consolidated in the Claimant's salary.
8. In his testimony before Court, the Claimant stated that before he went for his off on Saturday 19<sup>th</sup> August 2017, he had done an official hand over to his deputy who was in charge in his absence. That the deputy was the first culprit and was part of the gang of four that were taken to Athi River Police Station. He testified that he had never worked on Saturday for the 10 years 8 months he worked at the Respondent Hospital as he was on off and that he never got any disciplinary issue and no theft had taken place prior. That he was appraised, got certificates and was always among the best and that he used to report to work at 6.00am and leave at 7.30pm without being paid any overtime. He also prayed for damages as he was dismissed for no fault of his, having not participated in the theft. The Claimant denied receiving any suspension letter or warning letter at any one time or that his department was split. He asserted that he kept records and would requisite for the store, which had a storekeeper.
9. The Respondent did not attend the hearing despite notification of the same as evidenced by the affidavit of service sworn by Mr. Owuor O. Reen who deponed that he served the Respondents on 4<sup>th</sup> April 2023 at 12.12pm evidence of which is the acknowledgement stamp by the Respondent's advocates which appears on the hearing notice duly served.
10. The Claimant submitted that section 43 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 of the *Act*. That the reason(s) for termination of a contract are the matters that the employer genuinely believed to exist at the time of termination of the contract, and which caused the employer to terminate the services of the employee. Further, that section 45 of the Act provides that the employer must not only prove that the reason for termination is valid and fair but that the employment was terminated in accordance with fair procedure. It was the Claimant's submission that the allegation in the Respondent's Witness Statement by Ms. Okatch that the theft went on under his watch were unfounded and untrue because such theft had never happened during



the period of his employment. In addition, the Respondent had not refuted that he was not at work on the night of the said theft and had not proved that he took part in the theft. The Claimant's position was that the Respondent had thus failed to prove the reason for terminating his employment and that the said reason was a fair one, which burden of proof lies with it as the employer, as provided under section 45 of the [Employment Act](#).

11. Further, that whereas the Respondent indicated in its Response that the investigations conducted had revealed wanton pilferage in the Claimant's department, it had not brought any evidence before court of the said findings. That the Respondent conveniently avoided bringing forth the report because none was conducted in the first place and in any event, he would have been charged together with the other employees if he were part of the alleged pilferage scheme. That the duty of ensuring the facility's security was on the Respondent, who had only one security guard for the entire facility stationed only at the gate and that at no point were employees frisked on entering and/or vacating the premises. It was the Claimant's submission that the Respondent had no justified reason for terminating his employment and as such, the termination was unfair under the provisions of sections 43 and 45 of the [Employment Act](#). On this submission, he urged the Court to be guided by the cases of [Mary Chemweno Kiptui v Kenya Pipeline Company Limited](#) [2014] eKLR that of [Walter Ogal Anuro v Teachers Service Commission](#) [2013] eKLR; and the case of [Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd](#) [2013] eKLR in finding that the Respondent failed to meet the substantive test. The Claimant submitted that having found that his termination was not substantively justified, he is entitled to his terminal dues as prayed in his Memorandum of Claim together with the interest on the award and costs of the case.
12. The Respondent was apologetic for inadvertently diarizing the hearing date wrongly, leading to their failure to attend on their part and sincerely regretted the same. It sought both the Court's as well as the learned counterpart's indulgence and undertook to take measures to avoid any such mistakes in the future. The Respondent consequently sought to rely on its filed pleadings including the Witness Statement of Ms. Okatch as well as the List of Documents on record. The Respondent submitted that as pleaded in its Response, the Claimant's actions brought him under the ambit of summary dismissal as set out under section 44(3) and (4)(c), (e) and (g) of the [Employment Act](#), 2007. That the Claimant was guilty of fundamentally breaching his obligations arising out of his contract of services, for wilful neglect of his performance of any work assigned to him, and/or gross misconduct as envisaged under sections 43 and 44 of the [Act](#). That it had provided proof of having fully complied with the provisions of section 41 of the Act on notification and hearing before termination on grounds of misconduct and that the Claimant had also acknowledged having attended the disciplinary hearing. It was the Respondent's submission that it at all times had complied with the law and followed due process in effecting the summary dismissal upon the Claimant.
13. It cited the case of ELRC Kericho Cause No. 7 of 2017 - [Francis Nyongesa Kweyu v Eldoret Water and Sanitation Company Limited](#) [2017] eKLR in which Njagi Marete J. found that the termination of the claimant's employment on grounds of misconduct had overwhelmed the cause and proceeded to dismiss the claimant's case while finding in favour of the respondent. The Respondent further submitted that the Claimant having failed to demonstrate that the correct procedure was not followed, he would not be entitled to the amount claimed. It urged the Court to find this matter, on the balance of evidence presented to it, in favour of the Respondent and to declare the termination of the Claimant's employment as fair, lawful and having met the minimum threshold for summary dismissal provided for under section 44 of the [Employment Act](#). Further, to consequently award costs and interests in favour of the Respondent's case.



14. It was the Respondent's submission that the Claimant had not provided any evidence whatsoever to prove the alleged overtime worked and that there would therefore be no basis upon which to award the same. That it presented before this Court the proof of payment of terminal benefits amounting to Kshs. 38,596/-, which the Claimant neither denied nor acknowledged receipt of. That it would thus be unfair on its part if the Court awarded any further damages or costs to the Claimant as it would be tantamount to rewarding wrongdoing. The Respondent urged the Court to thus direct that the Claimant's terminal dues of Kshs. 38,596/- were duly paid. It relied on the case of *Kipkirui Chepkeres Labati v Cooperative Bank of Kenya Limited* [2022] eKLR in which the Court held that the claimant was not entitled to the reliefs sought or any at all having found that the dismissal was both procedurally and substantively fair.
15. The Claimant was allegedly dismissed for wilful neglect to perform his duties, failure and/or refusal to obey a lawful and proper command from his supervisor, negligence in carrying out his duties, and complicity in and/or commission of the offence of theft against the Respondent. Whereas an investigation was undertaken, the report was not availed to the Court. As such, the accusations by the Respondent remain mere allegations as there was no proof availed of the Claimant's alleged negligence leading to the theft that led to some employees of the Respondent being charged in a court of law. The Claimant was notably missing from the list of accused persons.
16. In the case of *Walter Ogal Anuro v Teachers Service Commission* (supra), the employer has a duty to ensure that procedural fairness as well as substantive justice are present when an employee is being disciplined. Whereas the Respondent asserts the Claimant was paid his terminal dues, there is no proof of the same. Nevertheless, where a Court finds the employer did not adhere to the procedural and substantive justice under sections 41, 43 and 45 of the *Employment Act*, the dismissal is ipso facto unfair and unlawful, as I do hereby find. The Claimant had worked for the Respondent for 10 years with no disciplinary issue save for two warning letters in 2012 and 2014 which had expired by the time the Claimant was accused of the theft he did not, from the evidence adduced, participate in. The Respondent alleged the department the Claimant handled had to be split into two as he was a poor performer. That is hard to believe as no performance metrics were availed and no indication was given as to how he had delivered services for long below par and yet was retained instead of being dismissed. This is a classic case of where an employer alleges an employee was a poor performer just because it dismissed the employee without proper cause and has to clutch onto something to explain its mishandling of the employee or to attempt to justify its actions.
17. The employer did not give a breakdown on the payslip and even the contract did not indicate the payment would be a gross salary. Failure to itemise the payslip or salary leaves open accusations that the employer did not give the employee the house allowance due. As such, the Claimant is entitled to claim the same. However, since he never made efforts to claim it before his dismissal, his claim will be confined to the last year of service as the non-payment of house allowance was a continuing wrong and he should have sought the same within one year of the failure to pay.
18. As the Claimant has proved his dismissal was unfair and unlawful, I will award the Claimant 6 month's salary as compensation for the unfair and unlawful manner of dismissal as well as costs of the suit together with interest at court rates on the awarded sum. He will also get house allowance at 15% of the basic for the last year of service. In the final analysis I enter judgment for the Claimant as follows:-
  - a. A declaration that the Claimant's dismissal from the Respondent's service was unfair and unlawful within the meaning of the *Employment Act* sections 41, 43 and 45;



- b. 6 month's salary as compensation for the unfair and unlawful manner of dismissal – 113,850/-;
- c. House allowance for 12 months – Kshs. 29,700/-
- d. Costs of the suit;
- e. Interest on the sum in (b) and (c) above at court rates from the date of judgment till payment in full.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JULY 2023**

**NZIOKI WA MAKAU**

**JUDGE**

