



**Okoth v Jamii Telecommunication Limited (Cause 1556 of 2018)
[2023] KEELRC 1643 (KLR) (10 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1643 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1556 OF 2018**

JK GAKERI, J

JULY 10, 2023

BETWEEN

BONNIE JOAN OKOTH CLAIMANT

AND

JAMII TELECOMMUNICATION LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim dated November 19, 2018 alleging unfair and unlawful termination of employment and non-payment of terminal benefits and accrued dues.
2. The Claimant was employed by the Respondent on September 21, 2012 as a Transport Manager under a one-year renewable contract. Her employment was confirmed on the January 3, 2017 on permanent and pensionable basis at a monthly salary of Kshs 94,000/=.
3. The claimant avers that she was also hired as a consultant on a contractual basis whose duration was renewable after a period of 6 months, 1 year and 2 years respectively.
4. The claimant avers that she executed her duties as assigned diligently and faithfully until 1st of December 2016 when the Respondent terminated the consultancy contract on the ground of internal re-engineering.
5. The claimant avers that when she returned to work after her annual leave on the April 4, 2018, when she was informed that one of the Drivers was facing disciplinary hearing which she was requested to attend in her capacity as the Transport Manager.
6. That on completion of the hearing the driver was issued a termination letter and immediately thereafter the claimant was issued with a Notice to Show Cause for April 4, 2018 at 4:15 pm.



7. The claimant avers that she was not given sufficient time to respond to the allegations in the show cause letter and her request to be granted time was futile, nonetheless she hurriedly responded and was subjected to a hearing the next day the April 5, 2018.
8. The claimant further avers that the respondent attempted to coerce the Claimant into signing a letter admitting liability and accepting the allegations levelled against her but she declined and the Respondent terminated her employment
9. The claimant states that she was not informed of the reason for her dismissal despite discharging her duties as spelt in the employment contract.
10. The claimant prays for;
 - i. Notice to pay (one Month), Kshs 94,000/=.
 - ii. Compensation for unfair termination Kshs 94,000/= x 12 months, Kshs 1,128,000/=.
 - iii. Costs of the suit.

Respondent's Case

11. In response to the claim, the respondent filed a memorandum of response dated February 6, 2019 denying the allegations by the claimant.
12. The respondent admits that the claimant was its employee but denies that she worked diligently and honestly.
13. The respondent denies that it owes the claimant Kshs 1,128,000/= and states that the claimant was paid all dues.
14. The respondent further stated that the claimant was procedurally and fairly dismissed in terms of the provisions of the Employment Act and the terms of engagement.
15. The respondent states that it complied with all the legal requirements as set out in the Labour Relations Act, the Constitution and the Employment Act.
16. The Respondent urges the court to dismiss the claimant's Case with costs.

Claimant's evidence

17. At the hearing the claimant adopted the written statement dated November 19, 2018 that reiterated the contents of the memorandum of claim.
18. She testified that she received a notice to show cause on the morning of April 4, 2018 and was required to respond prior to the hearing scheduled on the same day at 4:15 pm.
19. The claimant stated that the Chief Finance Officer and the consultant Human Resource forced her to write a response but she protested via email. It was her testimony that she complained about the short notice she was given to attend the meeting at 4.15 pm.
20. The claimant alleged that the allegations levelled against her were not discussed during the meeting but was dismissed from employment immediately after the meeting.
21. The claimant stated that she was in charge of transport and ensured that all the vehicles were serviced on time.



Respondent's Evidence

22. RWI, Gladys Kurui, the Human Resource Officer of the Respondent adopted her witness statement dated December 2, 2019 as her evidence in chief.
23. In her evidence the witness stated that the claimant was employed by the respondent as a Transport Manager earning a gross salary of Kshs 89,000/=.
24. The witness stated that the claimant was given a Show cause letter dated April 4, 2018 requesting her to explain an accident that involved two company vehicles and why the procedure of accident management had not been followed.
25. It was her testimony that the show cause letter also sought for an explanation why the disciplinary hearing of one Mr Festus Ayembi was mishandled under her supervision.
26. That the claimant was also requested to explain why she failed to ensure that the company vehicles were serviced on time and why some vehicles were grounded due to lack of service which delayed her team and led to non-compliance with the traffic regulations leading to drivers being arrested and fined.
27. The witness testified that the disciplinary hearing was scheduled for April 4, 2018 at 4:15 pm but was conducted on the April 5, 2018 after which a decision was reached to summarily dismiss her on the ground of wilfully neglecting to perform her duties.
28. On cross examination the witness confirmed that the minutes of the disciplinary hearing were not filed and that no warning was served on the claimant.

Claimant's Submissions

29. According to the Claimant's counsel, the issues for determination are;
 - i. Whether the claimants dismissal was wrongful, unfair and unlawful
 - ii. Whether the claimant is entitled to the reliefs sought against the Respondent.
30. On the first issue, the claimant cited the sentiments of the court in *Walter Ogal Anuro V Teachers Service Commission* as follows;

“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.”
31. The claimant submitted that her termination was unfair as the respondent failed to prove that the reason for termination was valid and fair as provided under Section 45(2)(a) of the *Employment Act, 2007*.
32. The claimant further submitted that the Respondent summarily dismissed her for wilfully neglecting to perform her duties, which duties she states she was not aware of.
33. It was further submitted that the respondent failed to prove the reason for termination as required under Section 43 of the *Employment Act*;

“Any claim arising out of termination of contract the employer shall be required to prove the reason or reasons for the termination and where an employer fails to do so the termination shall be deemed to have been unfair within the meaning of section 45.”



34. The claimant submitted that she was not informed of the accident management procedures that she did not comply with.
35. It was further submitted that no investigations were conducted by the Respondent to ascertain the veracity of the alleged neglect of duty by the claimant.
36. The claimant also submitted that she was not given sufficient time to respond to the notice to show cause.
37. It was her submission that the respondent breached procedural fairness by failing to issue a warning either verbally or written prior to the issuance of the notice to show cause, failing to accord the claimant sufficient time to respond to the notice show cause letter, failing to investigate the allegations levelled against the claimant and finally summarily dismissing the claimant.
38. The claimant submitted that the respondent was not ready to treat the claimant in accordance with the principles of fairness hence the decision to unfairly dismiss her.
39. It was submitted that the respondent breached the general principles of natural justice required when action is taken against one that is a right to be heard, right to be informed of the decision made and the right to the reasons that led to the decision.
40. The claimant submitted that failure to accord her a hearing as provided under Section 41 of the *Employment Act* rendered her termination unfair. Reliance was made on the holding in *Kenfreight (EA) Limited v Benson K. Nguti* (2016) eKLR as well as in *Mary Chamweno Kiptui v Kenya Pipeline Company Limited* (2014) eKLR where the court held that;
- “Section 41 of the *Employment Act* is couched in mandatory terms. That is where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.”
41. The claimant submitted that she was denied a fair hearing and urged the court to find that the decision to terminate her employment was illegal, unlawful and unfair.
42. As regards the reliefs sought, the claimant submitted that having demonstrated that she was unfairly terminated she was entitled to pay in lieu of notice and compensation for unlawful termination.
43. The claimant cited the provisions of Section 49(1) of the *Employment Act*;
- “Where in the opinion of the labour officer Summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay the employee any of the following;
- a. . . .
 - b. . . .
 - c. the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.”



44. Reliance was made on the holding in *Abisalom Ajusa Magomere v Kenya Nut Company Limited* (2014) eKLR where after finding the termination of the claimant's employment to have been unfair for want of substantive justification and procedural fairness, awarded the claimant 12 months' salary in compensation.
45. In addition, the claimant urged the court to award costs.

Respondent's Submissions

46. The respondent's counsel identified two issues, namely; whether termination of the claimant's employment was unfair and unlawful and whether the remedies are available.
47. Counsel submitted that the claimant wilfully neglected her duties and the respondent issued a notice to show cause and subjected the claimant to a disciplinary hearing and her termination was procedurally and substantively fair.
48. Counsel further submitted that the claimant was paid all her dues prior to her termination and having been fairly terminated the remedy for damages is unavailable to her.
49. Counsel urged the court to dismiss the claim with costs.

Analysis and Determination

50. 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.
51. As to whether termination of the claimant's employment was unfair, the *Employment Act*, 2007 provides that for a termination of employment to pass the fairness test, it must be substantively and procedurally fair.
52. Needless to emphasize, the provisions of Section 43, 45(2) and 47(5) of the Act set out the requirements for termination, namely; there must be valid and fair and in relation to the matters set forth in Section 45(2)(b)(i) and (ii) of the Act. Section 47(5) addresses justification for the termination.
53. The provisions of Section 45(2)(c) and 41 of the *Employment Act* address procedural fairness.
54. Section 41 of the Act prescribe the mandatory procedural elements which characterise a fair termination of employment.
55. The essence of these provisions was underscored by the Court of Appeal in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR.
56. The twin requirement was also underlined by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR as follows;

“ . . . 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 . . . ”

Reason for Termination

57. According to RWI, the claimant's employment was terminated for wilful neglect to perform her duties consistent with the provisions of Section 44(4)(c) of the *Employment Act*, 2007.



58. The summary dismissal letter dated April 5, 2018 stated in part;
- “The Company finds that you wilfully neglected to perform your duty which in its nature forms what was your duty to perform carefully and properly . . .”
59. The respondent merely reproduced part of Section 44(4)(c) of the *Employment Act*, 2007.
60. Intriguingly, the letter makes no reference to the specific charges proved against the claimant. The relevant particulars are missing.
61. Instructively, the notice to show cause dated April 4, 2018 received by the claimant at 3.50 pm contained 5 allegations including incompetence, delayed service of vehicles, mishandling of arrests of drivers, failing to report an accident that happened on February 20, 2018 until March 5, 2018 and the handling of one Festus Ayabei’s misconduct.
62. The letter itemised the respondent’s exposure as well.
63. Strangely, the letter did not require a response to the allegations but invited the claimant to a hearing on the same day at 4.15 pm, 25 minutes after receipt of the letter and as a recap, the letter notified the claimant to bring a witness of his choice to the meeting.
64. To her credit, albeit belatedly, the claimant endeavoured and responded to the notice to show cause by email dated April 5, 2018 at 11.45 am. There is no evidence that the disciplinary committee took the response into account bearing in mind that it had not been asked for.
65. Similarly, the respondent adduced no evidence to show that evidence adduced at the hearing established the charges against the claimant.
66. In the absence of an investigation report, documents or witness statements produced at the hearing or minutes, it is surmisable that the respondent had no evidence to establish the charges against the claimant, whom it did not accord time to avail or prepare her defence.
67. It is unclear to the court as to how the disciplinary committee arrived at its decision.
68. More significantly, the speed at which the claimant’s case was handled would appear to suggest that a decision to terminate her employment had already been made.
69. The provisions of Section 43 of the *Employment Act* are unambiguous that;
1. 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.
70. For the foregoing reasons, the court is satisfied and finds that the respondent has failed to prove on a preponderance of probabilities that it had a valid and fair reason to terminate the claimant’s employment on April 5, 2018. It has failed to demonstrate that it had a substantive justification as required by the provisions of Section 47(5) of the *Employment Act*, 2007.

Procedure

71. The specific elements of procedural fairness have been emphasized in innumerable decisions among which is the Court of Appeal decision in *Postal Corporation of Kenya V Andrew K Tanui* (2019) eKLR.



72. In the instant case, it is not in dispute that the Claimant was an employee of the respondent and on the April 4, 2018 she was issued with a notice to show cause requiring her to attend a disciplinary hearing on the same day.
73. The claimant states that she requested for more time to respond to the charges but the respondent declined. It is worth noting that the disciplinary hearing took place on April 5, 2018.
74. The question is whether one day was sufficient time for the claimant to respond to charges and prepare for the disciplinary hearing?
75. In determining this issue, the court is guided by the holding in *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Limited* [2013] e-KLR, and *David Wanjau Muboro v Ol- Pejeta Ranching Limited*, [2014] eKLR where the court emphasized that fair disciplinary hearing comprises: -
- a. Sufficient opportunity to the employee, to prepare.
 - b. Right to fully understand the charges.
 - c. Right to documentation.
76. The court is not persuaded that one day was sufficient time for the claimant to understand the charges she was facing, respond and prepare her defence. To that extent, it is the finding of the court that the claimant was not accorded a fair disciplinary hearing.
77. In *Postal Corporation of Kenya V Andrew K. Tanui* (*Supra*), the Court of Appeal itemised the essentials of procedural fairness as follows;
- “ Four elements must thus be discernible for the procedure to pass muster: -
- i. an explanation of the grounds of termination in a language understood by the employee;
 - ii. the reason for which the employer is considering termination;
 - iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination are made;
 - iv. hearing and considering any representations made by the employee and the person chosen by the employee.”
78. Regrettably, the respondent did not file minutes of the disciplinary hearing for perusal by the court and confirmation whether a hearing took place and whether the provisions of the *Employment Act, 2007* were complied with.
79. It is unclear whether the Claimant attended the hearing in the company of a colleague of her choice or was unable to procure one owing to the short notice. Minutes of the proceeding would have put this matter to rest.
80. Similarly, the respondent did not comply with the terms of the contract of employment it had given the claimant. Clause 12 of the contract prescribed the Disciplinary Procedure.
81. RWI confirmed that no warning was given to the claimant or recorded and no dismissal notice was given contrary to Clause 12(iv).
82. For unexplained reasons, the respondent blatantly ignored not only the provisions of *Employment Act, 2007* but also the terms of engagement it had prescribed and subscribed to.



83. In light of the foregoing, it is the finding of the court that the claimant has proved on a preponderance of probabilities that her termination from employment was procedurally flawed and thus unfair.

Reliefs

84. Having found that termination of the claimant's employment was unfair, the claimant is entitled to the following reliefs;

a. One month's salary in lieu of notice

85. The letter of summary dismissal dated April 5, 2018 makes no reference to the one (1) month's notice provided by Clause II of the contract of employment dated January 3, 2017 and the respondent adduced no evidence that it paid the claimant in lieu of notice.

The claimant is awarded to 1 month's salary in lieu of notice.

b. 12 month's salary compensation

86. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to the relief provided by Section 49(1)(c) of the *Employment Act*, 2007.

87. In determining the quantum of compensation, the court has taken the following into consideration;

i. The Claimant was an employee of the respondent for a period of about 6 years, 7 months. It is unclear whether she wished to continue in employment.

ii. The Claimant did not appeal the decision of the disciplinary committee.

iii. From the email communication on record, it is evident that the claimant contributed to the termination to some limited extent.

88. In the circumstances, the court is satisfied that the equivalent of five (5) month's salary is fair.

89. In conclusion, judgement is entered for Claimant against the Respondent in the following terms;

a. One (1) month's salary *in lieu* of notice.

b. Equivalent of 5 month's salary.

c. Costs of this suit.

d. Interest at court rates from the date hereof till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 10TH 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

