



REPUBLIC OF KENYA



KENYA LAW
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**Oselu v Havanet Limited (Cause E943 of 2021)
[2023] KEELRC 1633 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1633 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E943 OF 2021**

AN MWAURE, J

JULY 6, 2023

BETWEEN

JERIMI OMONDI OSELU CLAIMANT

AND

HAVANET LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim dated the 28th day of October on the November 17, 2021. He says he was engaged on or about July 6, 2020 for 5 years. He was earning ksh 170,000/= until when the Respondent unceremoniously dismissed him from the employment. The claimant avers that until the unlawful termination of his employment, he faithfully and diligently performed his duties as an employee and his consistent outstanding performance was recognized by the Respondent on various occasions.
2. He says that within 2 months of working, they had 150-200 rides a day, a miracle within the industry as it was a new company and during covid 19 pandemic. Due to his hard work, the claimant recruited corporate companies. Around August 2020, the claimant was requested by his supervisor to train a new employee who was of Somali origin. He trained the new employee as required without knowing that he was training his replacement. In the month of October, he was called by the Co-Director. Bashir, and told to report to his office the next day by 10.00 am and as required they met.
3. In inexplicable turn of events, and without any legal justification, the Respondent terminated the claimant employment on October 21, 2020 alleging failure to meet set targets. The claimant states that he performed his work diligently without any complaints from the Respondents. No performance improvement plan was ever initiated by the Respondent, he was promised a job security by the Respondent herein when he poached him from the Company he was working, a position to which the Respondent have failed to adhere to. By a letter dated the October 12, 2021 the Respondent informed the claimant to improve his performance which he did without any help from the Respondent.



4. The claimant says that he was not subjected to any disciplinary proceedings as required by the law. Instead, the Respondent unilaterally terminated the claimant's employment without affording the claimant a chance to be heard. The claimant was therefore condemned unheard and was not given reasonable opportunity to show cause why adverse action such as termination ought not to have been taken against him. He therefore says the Respondent has failed to pay the claimant's dues as provided by the statutory law.
5. The claimant prays for the following;
 - a. Damages for unfair and unlawful termination of 12 months x ksh 170,000 = ksh 2,040,000/
 - b. Two months' salary in lieu of notice of ksh 2 months x 170,000= ksh 340,000/=
 - c. Balance of contract period of 58 months x 170,000= ksh 9,860, 000/=Total = 12, 240, 000/=
- d. Certificate of Service
6. The Respondent did not file any pleadings or submission.

Claimant's submissions

7. In his submissions the claimant submits that he was summarily dismissed without any notice as per paragraph 11.2 of the Employment Contract or justifiable reason issued. He was not given the opportunity to be heard and defend himself as required by the law and so he was humiliated and suffered both mentally and financially. He states that his termination was unfair, wrongful and illegal and that section 45 (2) of the Employment Act was violated.
8. He says that section 45(2) of the Employment Act requires for termination to be valid and be fair as related to an employee's conduct, capacity or compatibility or based on the operational requirements of the employer it must establish that employment was terminated in accordance with fair procedures. He says in his case no reason for termination was given or notice issued.
9. Claimant also claims that he was subjected to unfair treatment two months after joining the company after being enticed by the Respondent to join the Company and leave his previous job where he had job security. He says the main reason he was terminated was due to discrimination as the claimant was replaced by the cousin to the Director who is of Somali origin.
10. Further he says that no notice was issued to the claimant and the Respondent has not produced or filed any document to state otherwise and in contravention of the claimant's averments. The claimant contends that under section 43 (1) of the Employment Act where the employer fails to prove the reason of termination the termination is deemed to be unfair and the Respondent herein has failed to prove the reasons for termination.

Analysis and determination

11. The issue for determination is basically whether the claimant was terminated fairly or not.
12. The evidence adduced show claimant was not given valid reason for termination. In the case of Ken Freight Limited vs Benson K. Nguti court held that an employer is duty bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reasons or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an



employer before the decision to terminate his contract of service is taken. Further looking at the pleadings and the correspondences between the parties and the evidence on record, no reason at all was given by the Respondent why claimant's services were to be terminated. He was not informed of his transgressions. Neither was he given an opportunity to explain himself. Nothing demonstrates his own sentiments contained in his letter written after the board meeting were controverted.

13. The claimant's evidence is that one morning he was called by the respondent's co-director, Bashir, and told to report to his office the next morning around 10 am. He says that he found that abnormal because they had just had the Thursday board meeting and the said co-director was well briefed on their strategies and plans for the week which was coming.
14. He says the director terminated his contract and told him he should not be anywhere near the office again. He said that he insisted that the Respondent do provide him with reasons for termination but he was told by the Respondent that he was displeased with his performance without saying what exactly he had done. He also says that he was never served with any notice of termination of his contract as provided by the contract dated the July 6, 2020.
15. Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the four corners of the legal threshold set out by section 45 of the *Act*.
16. The Respondent never filed anything in court and has not participated in the hearing of the case. There is no indication or proof of any disciplinary hearing having been conducted prior to the decision to terminate. Absence of conducting disciplinary hearing imports unfairness and unlawfulness of the decision to terminate. The court adopts the decision earlier cited Kenfreight Limited vs Benson K. Nguti supra where court held that the employer must explain where employee in a language they understand the reason for termination.
17. The employer must also give the employee an opportunity to be heard in the presence of a fellow worker of his choice or a shop floor union representative.
18. The court finds the evidence adduced by the claimant is convincing and is not contraverted. The court therefore enters judgment in favour of the claimant and proceeds to award him remedies as follows.
19. Remedies
 - a. For compensation for unfair termination and considering the guidelines in section 49(1) (c) of the *Employment Act 2007* he is awarded 2 months' salary Kshs 340,000/-.
 - b. One month salary *in lieu* of notice kshs 170,000/-
 - c. Balance of contract period is not warranted and is declined.
 - d. The total award is kshs 510,000/- and interest at court rates from date of judgment till full payment.
 - e. Costs of the suit are awarded to the claimant as well.
 - f. Claimant is to be availed his certificate of service within 30 days from today's date.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 6TH 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

