



**Nyabiba v Hakika Transport Services Ltd (Cause 654 of 2015)  
[2023] KEELRC 2357 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2357 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 654 OF 2015  
AK NZEI, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**HENRY MAYUYA NYABIBA ..... CLAIMANT**

**AND**

**HAKIKA TRANSPORT SERVICES LTD ..... RESPONDENT**

**JUDGMENT**

1. The suit herein was instituted by the Claimant against the Respondent on 2/9/2015 vide a memorandum of claim dated 31/8/2015 whereby the Claimant pleaded that he was employed by the Respondent as a security Officer from 15/3/2003 upto 23/3/2015, earning ksh. 625 per day as at the time of termination.
2. The Claimant further pleaded:-
  - a. that on 23/3/2015, the Claimant was summoned by his supervisor, a Mr. Ngaira, and was informed by the said supervisor that the Respondent had decided that the Claimant's services were no longer required.
  - b. that termination of the Claimant's employment was wrongful, unlawful, abrupt, contravened the law, that no reason was given for the termination and the Claimant was not given an opportunity to be heard.
  - c. that the Respondent refused to pay the Claimant's dues despite several demands.
  - d. that the Claimant was never allowed to take annual leave, and was not compensated for the same at the time of termination. That the Claimant was never registered under a pension or provident fund under the *Retirement Benefits Act*, a gratuity or pension scheme established under a collective agreement, the National Social Security Fund or service scheme established



under a collective agreement, and was therefore entitled to service pay at the rate of 15 days pay for every year worked.

3. The Claimant set out his claim against the Respondent as follows:-
  - a. one month's notice pay .....ksh. 13,650
  - b. payment in lieu of accrued annual leave 21(days)X ksh. 525x11.6 years = ksh. 127,890.
  - c. service pay at the rate of 15 days for every completed years of service - 11xksh. 525x15= ksh. 86,625.
  - d. maximum compensation for wrongful dismissal and unfair termination of employment contract (ksh. 525x26 daysx12 months ).....ksh. 163,800
  - e. certificate of service.
  - f. costs of the suit and interest.
4. Other documents filed by the Claimant included an affidavit in verification of the claim, the Claimant's written witness statement dated 31/8/2015 and an evenly dated list of documents listing two documents; these being the Claimant's National identity card and a demand notice dated 17/8/2015.
5. On 27/6/2016, the Respondent filed an evenly dated Response to the memorandum of claim, which was subsequently amended on 9/12/2017. The Respondent denied the Claimants' claim, and denied having unlawfully dismissed the Claimant. The Respondent further pleaded:-
  - a. that the Claimant had engaged in acts of misconduct, and was invited to a disciplinary hearing that was held on 24/3/2015, but the Claimant aggravated his said facts of gross misconduct by failing, refusing and /or declining to attend the disciplinary hearing.
  - b. that upon the (Respondent's) management noting that the Claimant had attained the statutory retirement age, it duly terminated the Claimant's services and paid all his accrued dues.
  - c. that the Claimant is not entitled to the reliefs sought.
  - d. that the Claimant filed a complaint with the Labour Department, in accordance with the Labour Relations Act in respect of the claim herein, which was concluded and fully settled, and that the claim herein is res-judicata.
  - e. that having reached retirement age, the Claimant is not entitled to terminal benefits.
  - f. that the Claimant was a registered member of NSSF, and that the Respondent remitted all statutory deductions payable on behalf of the Claimant.
6. Other documents filed by the Respondent included a witness statement of one Rajab Yeri Kombe date 25/7/2016, and an evenly dated list of documents listing nine documents. The listed documents included minutes of a disciplinary meeting dated 24/3/2015, the Claimant's employment attendance records, NSSF contributions for 2013 and 2015, NHIF records, a warning letter dated 14/3/2015, summary dismissal letter dated 25/3/2015, County Labour Officer's determination letter dated 9/7/2015, copy of a cheque issued to the Labour Officer and a forwarding letter thereof. Also filed by the Respondent was a witness statement of one Patrick Ngaira dated 16/11/2017 (filed on 16/11/2017) and a supplementary list of documents dated 16/11/2017, listing more documents, which included Gate Movement Control Book from 20/3/2015 to 22/3/2015, Booking Records Book



from 20/3/2015 to 22/3/2015, Attendance Records for Support Staff from 23/3/2015 to 24/3/2015 and payment list from 26/2/2015 to 25/3/2015.

7. On 13/8/2019, the Respondent filed yet another supplementary list of documents, listing a letter from the Ministry of Labour dated 29/5/2019.
8. On 29/4/2019, the Claimant filed an affidavit sworn by himself on 10/4/2019, stating that although he referred a dispute to the Labour Office for conciliation and report thereon was written, minutes of the conciliation process and a conciliation certificate thereon were not issued to them (the parties) by the conciliator, and that no reason for that failure was given. That aggrieved by the conciliator's verdict, the Claimant filed the present claim.
9. The Court's record herein shows that trial commenced on 6/5/2021 before Ndolo, J. The Claimant adopted his witness statement dated 31/8/2015 as his testimony, and produced in evidence the two documents referred to in paragraph 4 of this judgment. The Claimant further testified:-
  - a. that he was employed as a security guard by the Respondent on 15/3/2003 and worked until 23/3/2015. That while he was on night duty, he was told by the Respondent's Officer (a Mr. Ngaira) to go home and to report to the Office the following day. That at the Office, the HR (a Mr. Rajab Yeri Kombe) told him to go away as there was no work for him.
  - b. that the Claimant was not given any reason, was not given any termination letter; was not called for any hearing on 24/3/2015, and was not notified of any meeting.
  - c. that the Claimant worked without being given any leave, and was not paid in lieu.
10. Cross-examined and re-examined, the Claimant testified:-
  - a. that he was never given leave, but was given off on Sundays.
  - b. that he worked with many other security guards, that he never worked at the gate, never scanned vehicles getting in and out, and only patrolled in the yard.
  - c. that the Claimants' NSSF dues were remitted in March 2015.
  - d. that the Claimant took the dispute to the Labour Office, but he was dissatisfied with the Labour Officer's verdict.

That the Claimant was not aware of any payment having been made to the Labour Officer, and that the Claimant was not paid.
  - e. that the Claimant did not agree with the Labour Officer's recommendations.
  - f. that the Claimant was not given any show cause letter, was not given any letter to attend a disciplinary hearing, and was not given a termination letter.
  - g. that the Claimant used to sign an attendance register, and that the Respondent had not produced the Muster Roll.
11. The defence case was heard before me on 18/1/2023 when the Respondent called two witnesses, Patrick Mulwa Ngaira (RW1) and Rajab Yeri kombe (RW-2). RW-1 told the Court that he was the Respondent's Security Supervisor, had worked with the Respondent for 11 years; and that he was the Claimant's supervisor. He adopted his witness statement dated 16/11/2016 as his testimony. The witness further testified:-



- a. that he visited the Respondent's yard and found that the guards at the gate, who included the Claimant, had allowed unbooked vehicles into the Respondent's yard/depot and told them to go to the HR's Office the following day.
  - b. that allowing unbooked vehicles into the Respondent's yard/depot occasioned loss on the part of the Respondent as containers were only allowed to remain the yard for free for 14 days, after which charges would be levied.
12. Cross-examined, RW-1 testified that he had not exhibited any complains raised against the Claimant and his operations on the date in issue; and that no evidence had been tendered to show that the Claimant was sent to the HR. That the Claimant was referred to the HR by word of mouth, and no formal charge/allegation had been raised against the Claimant.
13. RW2 told the Court that he was the Respondent's Human Resource Manager, a position that he had held for 7 years. He adopted his witness statement dated 25/7/2016 as his testimony and produced in evidence the documents referred to in paragraph 6 of this judgment, save for the documents listed as item numbers 5 and 6 on the list of documents dated 25/7/2016, which were found not to have been filed/exhibited by the Respondent.
14. RW2 further testified that the Claimant just left/absconded duty and was not terminated by anybody. That he (RW-2) learnt from the Claimant's supervisor that the Claimant and other guards had been told by their supervisor (RW-1) to go and see the HR (RW-2) for failing to do what they were supposed to do; and that they were supposed to see him (RW-2) so that the allegations by the supervisor could be heard, as well as the Claimant's and the other guards' side of the story. That the Claimant and his colleagues did not turn up, and the disciplinary committee decided that the Claimant be retired.
15. It was RW-2's further evidence that the Respondent received a letter from the Ministry of Labour stating that the Respondent had terminated the Claimant. That the Labour Officer found that the Claimant had not been terminated but had left employment on his own and told the Respondent to pay him ksh. 21,492, which the Respondent paid, but the Claimant did not collect from the Labour Office.
16. RW-2 further testified:-
- a. that the Claimant used to take leave, and that documents produced by the Respondent showed that it was not on each day that the Claimant reported to work.
  - b. that although the Claimant worked for 12 years, he was not entitled to service pay as he was an NSSF contributor.
  - c. that the Respondent did not refuse to issue the Claimant's certificate of service, that the Claimant absconded duty.
17. Cross-examined, RW-2 testified:-
- a. that the Claimant was not issued with any letter/notice requiring him to go and see RW-2 (the HR) or to attend any disciplinary committee, but a decision was made by the disciplinary committee to retire him.
  - b. that the Respondent had nothing to show that it advised the Claimant to collect his money from the Labour Office.
  - c. that the Respondent had no documents to show that the Claimant either took leave or was paid in lieu.



- d. that it is the Claimant who took (filed) a dispute in the Labour Office, and that the witness (RW-2) met him there as he attended meetings there on behalf of the Respondent.
18. Having considered the pleadings filed and evidence presented by the parties, issues that present for determination, in my view, are:-
- a. whether termination of the Claimant's employment was unfair.
  - b. whether the Claimant is entitled to the reliefs sought.
19. On the first issue, the Respondent testified that in the course of his employment as a security guard, the Claimant engaged in acts of gross misconduct and when called upon to attend a disciplinary hearing on 24/3/2015, he aggravated his misconduct by declining to attend the disciplinary hearing. That upon noting that the Claimant had attained the statutory retirement age, the disciplinary committee terminated the Claimant's employment and paid his accrued dues. It is to be noted that the Respondent did not produce in evidence any letter/show cause letter issued by it to the Claimant informing him of any allegations of gross misconduct levelled against him by the Respondent and/or its officials/supervisor, and calling upon him to respond to the same.
20. Fairness or lack of it in terminating an employee's employment, for whatever reason, may either be procedural or substantive. But unfairness, whether procedural or substantive, if proved to have occurred, is unfairness and attracts legal consequences. Section 41 of the Employment Act sets out, in mandatory terms, the procedure that must be adhered to by any employer contemplating to terminate an employee's employment on grounds of misconduct, poor performance or physical incapacity. The section provides as follows:-
- “(1) 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.
  - (2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”
21. The import of the foregoing statutory provision is that the reason and/or reasons for the contemplated termination of employment must be formally communicated to the employee, and the employee must be given reasonable time to respond to the charges/accusations leveled against him or her by the employer, and must be heard on the same before any disciplinary action can be taken against him or her.
22. I recently stated as follows in the case of *Zablon Nyambane Okwoyo – Bank Of Africa* [2013] eKLR:-
- “18. A charge sheet in Labour laws is a memorandum of charges (acts and omissions) alleged to have been committed by the employee, and consists of allegations and facts which the person issuing it wishes to establish against the employee.



A formal charge sheet (formal accusation) of alleged misconduct, negligence (acts of omission) in Labour laws seeks to fulfil one of the basic principles of natural justice that a fair and reasonable opportunity of being heard must be given to a person alleged to have misconducted himself or committed a breach of the law or set regulations. This principle cannot be achieved unless the person is specifically told of the accusations levelled against him. The person must be told of his alleged guilt for him to state his views in response thereto.

19. A fair hearing presupposes a precise and definite catalogue of charges so that the person charged may understand and effectively meet it. If the charges are not precise and are not definite, the person charged cannot understand them and cannot defend himself effectively, and the resulting enquiry would not be fair and just...”
23. In the instant case, the Respondent’s witnesses testified that the Claimant was found misconducting himself by his supervisor (RW-1) and was told to go home and report to RW-2’s Office the following day (one 24/3/2015), but did not turn up for the disciplinary hearing, leading to termination of his employment.
24. The Claimant in the present case was thus not shown to have been issued and served with a formal catalogue of the accusations levelled against him/charge sheet, generally referred to as show cause letter, was never formally invited for any disciplinary hearing, and he never attended any. Any allegations of misconduct levelled against the Claimant and which led to termination of his employment were never proved by the Respondent.
25. Section 43(1) of the [Employment Act](#) provides as follows:-
  - “(1) (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or the 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.”
  - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”
26. The Respondent did not demonstrate fairness, procedural or substantive, in terminating the Claimant’s employment. It was stated as follows in [Walter Ogal Anuro v Teachers Service Commission](#) [2013] eKLR:-

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
27. I find and hold that termination of the Claimant’s employment was procedurally and substantively unfair. The allegation by the Respondent of the Claimant having attained mandatory retirement age and hence the abrupt and unprocedural termination of his employment cannot mitigate against my foregoing finding as no process is shown to have been followed to achieve the Claimant’s alleged retirement, and the fact of attainment by the Claimant of statutory retirement age was not proved by the Respondent.



- 28. Before delving into the second issue, it is important to first establish the Claimant’s monthly earnings at the time of termination of his employment. The Respondent (RW-2) stated in evidence (in his written witness statement which he adopted in Court as his testimony) that the Claimant was employed by the Respondent on 25/9/2003 with a salary of ksh. 525 per day, and worked until 23/3/2015.
- 29. On the second issue, and having found that termination of the Claimant’s employment was unfair, I award him the equivalent of nine months’ salary being compensation for unfair termination of employment. That is kshs. 525X26X9 = 122,850. The claim for ksh. 13,650 being one month salary in lieu of notice is allowed. It is to be noted that the Claimant’s claim is based on 26 working days per month. Parties shall forever be bound by their pleadings.
- 30. The claim for ksh. 127,890 being payment for leave accrued over the years is allowed. The Respondent did not produce any document to show that the Claimant took any annual leave during the period of employment. The Respondent was the custodian of such documents, if at all they existed, by dint of Section 74(f) of the Employment Act. The claim for service pay is declined as the same was not proved by the Claimant to have been payable to him, either under his contract of employment or under any collective bargaining agreement that affected the Claimant. Further, the Claimant was shown to have been an NSSF contributor and on that basis, Section 35(6)(d) excluded him from claiming service pay.
- 31. The claim for a certificate of service is allowed under Section 51(1) of the Employment Act.
- 32. Finally, and having considered written submissions filed by counsel for both parties herein, judgment is hereby entered for the Claimant against the Respondent as follows:-
  - a. Compensation for unfair termination  
of employment .....ksh. 122,850
  - b. Payment in lieu of notice.....ksh. 13,650
  - c. Accrued leave .....ksh. 127,890
  - Total ksh. 264,390
- 33. The Respondent shall issue the Claimant with a certificate of service pursuant to Section 5(1) of the Employment Act within 30 days of this judgment.
- 34. The Claimant is awarded costs of the suit and interest at Court rates.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29<sup>TH</sup> SEPTEMBER**

**2023**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Respondent fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

..... for Claimant



..... Respondent

