



Nzioka v Sayani Investments Ltd (Employment and Labour Relations Cause 319 of 2019) [2023] KEELRC 2271 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2271 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 319 OF 2019
BOM MANANI, J
SEPTEMBER 29, 2023**

BETWEEN

JOHN MUTISYA NZIOKA CLAIMANT

AND

SAYANI INVESTMENTS LTD RESPONDENT

JUDGMENT

1. This is a claim for unfair termination. The parties had an employment relation that was terminated through the Respondent's letter dated 30th September 2016. The Claimant has challenged the termination as unfair. As a result, he has filed this action seeking compensation.
2. According to the Claimant, the Respondent offered him employment in April 2013 in the position of Property Supervisor. It is his case that he served the Respondent diligently until his employment was irregularly terminated through the Respondent's letter of 30th September 2016.
3. The Claimant states that he was taken ill on 27th September 2016 and as a result, was not able to report to work. He avers that he notified the Respondent of his sickness through a phone call to its management.
4. The Claimant states that after he recovered, he resumed work the Saturday that followed which was 1st October 2016. It is his case that he furnished the Respondent with medical chits to confirm that he had been unwell. The chits were allegedly deposited with the Respondent's receptionist.
5. The Claimant avers that in a surprise turn of events, he was told that his services were no longer required. He claims that he was told to proceed on compulsory leave only to be issued with a letter terminating his contract of service.



6. The Claimant avers that he was not notified of the reason for terminating his employment. Further, he contends that he was not subjected to a disciplinary process before he was issued with the letter of 30th September 2016 which terminated his contract of service with effect from 30th November 2016.
7. On its part, the Respondent confirms that the Claimant was indeed its employee serving on short term contracts until 30th November 2016 when the parties separated. The Respondent indicates that the Claimant's last contract was entered into on 1st April 2015 and was to have run until 31st March 2018.
8. The Respondent states that although the Claimant's services were initially good, his performance began to deteriorate after he took up his last contract. The Respondent states that the Claimant was warned severally about this poor performance and asked to improve but to no avail.
9. The Respondent states that between 24th September 2016 and 1st October 2016, the Claimant absented himself from work without lawful cause and permission. It is the Respondent's case that its management tried to contact the Claimant to ascertain his whereabouts during the period of his absence but to no avail.
10. The Respondent states that after all efforts to trace the Claimant proved futile, it presumed that the Claimant had absconded from duty. Consequently, it issued him with a letter of termination of his employment which was handed to him in early October when he showed up at work.
11. The Respondent states that it sent the Claimant an email around 27th September 2016 asking him to report to work the following day and explain his absence. When he did not report as requested, the Respondent issued him with the letter dated 30th September 2016 terminating his contract with effect from 30th November 2016. In the Respondent's view, the decision to terminate the Claimant's employment was for valid reason and in accordance with due process.
12. The Respondent further states that despite the parties having separated on 30th November 2016, the Claimant requested to be reengaged in early 2017. As a result, he was given short term consultancy contracts which came to a close on 30th April 2017.

Issues of Determination

13. After evaluating the pleadings and evidence on record, the following appear to be the issues for determination:-
 - a. Whether the Claimant's employment contract was validly terminated.
 - b. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.

Analysis

14. On the first issue, it is clear that the reason why the Claimant's employment was terminated was his failure to report to work as from 24th September 2016. This is evident from the letter of termination that the Respondent issued to the Claimant dated 30th September 2016.
15. Although in its Statement of Defense and testimony in court the Respondent has accused the Claimant of poor performance, the letter of termination shows that this was not a factor in the decision to terminate the Claimant's employment. As a result, the issue of the Claimant's poor performance is of no relevance to the dispute at hand.



16. In relation to the Claimant's absence from duty, it is his case that this was occasioned by ill health. The Claimant alleges that he notified the Respondent of this fact through a telephone call to its management.
17. Despite this assertion, the Claimant did not provide medical evidence to demonstrate that he was prevented from reporting to work due to ill health. Copies of the clinical charts allegedly deposited with the Respondent's receptionist were not produced in evidence. Neither was the said receptionist called to affirm the Claimant's assertion that he gave her the documents.
18. On the contrary, the email correspondence between the parties on 26th and 27th September 2016 point to other possible reasons why the Claimant may have opted to stay away from work. The emails suggest that there was friction between the Claimant and one Karim, his immediate supervisor. Apparently, this friction had strained the relation between the two. The strained relation appears to have informed the Claimant's election to stay away from work.
19. Although the Claimant has pleaded that he was absent from duty on 27th September 2016, the email trail suggests that he had been away from duty from an earlier date. In the premises, the court is inclined to believe the Respondent's evidence that the Claimant had been away from duty from 24th September 2016.
20. The Claimant has not furnished proof that he was prevented from reporting to work due to ill health. It is also evident that he did not seek the Respondent's permission to be off duty. This is evidenced by the Respondent's management's email to him dated 27th September 2016 in which the Claimant was reprimanded for being absent from work without valid basis.
21. In the face of this evidence, it is clear to me that the Claimant's conduct of staying away from work without lawful reason and permission amounted to misconduct as envisaged under section 44 (4) (a) of the *Employment Act*. In the premises, I find that the Respondent had a valid reason to consider terminating the Claimant's contract of service.
22. Notwithstanding the presence of a valid reason to terminate the Claimant's contract of service, the Respondent was obligated by section 41 of the *Employment Act* to: notify the Claimant of the reason why it was proposed that his contract should be terminated; and allow the Claimant an opportunity to respond to the accusations against him. This procedure contemplates a formal process in which the employee is notified that he is to undergo a disciplinary process that may result in the loss of his employment.
23. The Respondent asserts that it subjected the Claimant to this process. On the other hand, the Claimant states that he was not afforded a chance to be heard before his contract was terminated.
24. Sections 43 and 45 of the *Employment Act* place on the employer the obligation of justifying the reason for terminating an employee's contract of service. In addition, the employer must demonstrate that he followed due process in arriving at his decision.
25. The Respondent alleges that after the Claimant failed to show up for the meeting of 28th September 2016, the Claimant's supervisor and the Respondent's Human Resource Officer tried to contact him to no avail. Consequently, a decision was taken to terminate his contract.
26. Although the Respondent's witness asserted that the Respondent's aforesaid officers tried to reach the Claimant through phone after 27th September 2016, no evidence of call logs was presented to court. No affidavit evidence by these officers was tendered in court to affirm the assertions by the Respondent's witness. And neither did the said officers testify in court.



27. There is evidence that the Respondent engaged the Claimant through email on 26th and 27th September 2016. There is evidence that there were email exchanges between the parties until then. It is curious that even as the Respondent's witness alleges that the Claimant could not be reached through phone after 28th September 2016, no effort was made to reach him through email which is shown to have been functional as at 27th September 2016. In the premises, I find the Respondent's assertion that the Claimant could not be reached until after he resumed in early October 2016 is incredible.
28. The Respondent wrote to the Claimant on 27th September 2016 asking him to attend a meeting the following day to discuss his absence from work. The Respondent states that the Claimant did not attend the meeting. Thus a decision was taken to terminate his contract.
29. The email of 27th September 2016 did not indicate to the Claimant that the meeting proposed for 28th September 2016 was of a disciplinary nature. Therefore, this proposed meeting could not pass for a disciplinary session contemplated under section 41 of the *Employment Act*.
30. Since the Claimant did not turn up for the aforesaid meeting, the Respondent was obligated to set in motion the disciplinary process under section 41 of the *Employment Act* by issuing the Claimant with a formal charge and inviting him to a disciplinary session before meting out the termination. This was not done.
31. There is no evidence of email correspondence (or indeed any other correspondence) between the parties after 27th September 2016 in which the Claimant was notified of the charge against him and notified of a disciplinary session at which he was to defend himself against the charge. In the premises, it is clear to me that the Respondent failed to uphold due process when processing the Claimant's termination from employment.
32. Having regard to the foregoing, it is my finding that although the Respondent had valid reason to terminate the Claimant's contract of service, it did not observe due process in terminating the said contract. As a result, the Respondent's decision in this respect is declared procedurally unfair.
33. Before I pen off on this issue, I note from the evidence on record that the Respondent has spoken to having re-engaged the Claimant on consultancy basis between January 2017 and April 2017. It is not clear whether the Respondent believes that this subsequent engagement regularized the impugned termination. In order to lay this to rest, it is important to state here that the two relations were legally distinct. As such, the parties' subsequent relation in 2017 had no bearing on the validity of the termination of the Claimant's contract as communicated to him through the Respondent's letter of 30th September 2016.
34. The next issue for determination relates to whether the parties are entitled to the reliefs that they seek through their respective pleadings. Since the Respondent's decision to terminate the Claimant's employment has been declared procedurally unfair, the court finds that the Respondent is not entitled to the reliefs that it seeks in the statement of defense. Conversely, it is my finding that the Claimant is entitled to compensation for unfair termination.
35. That said, it is clear from the evidence on record that the Claimant contributed to his misfortune by absenting himself from duty without valid reason and without permission. In terms of section 49 of the *Employment Act*, the court is obligated to take this conduct into consideration whilst assessing the quantum of compensation to award to the Claimant.
36. Having regard to the foregoing, I award the Claimant compensation that is equivalent to his gross monthly salary for two months, that is to say, Ksh. 275,000.00. This award is subject to the applicable statutory deductions.



37. I award the Claimant interest on the amount aforesaid at court rates from the date of this decision.
38. The Claimant is also awarded costs of the case.

Summary of the Award

39. The Respondent's decision to terminate the Claimant's contract of service is declared procedurally unfair.
40. As the Claimant substantially contributed to his misfortune, he is awarded compensation for unfair termination of his contract of service that is equivalent to his gross monthly salary for two months, that is to say, Ksh. 275,000.00.
41. The award is subject to the applicable statutory deductions.
42. The Claimant is awarded interest on the aforesaid sum at court rates from the date of this decision.
43. The Claimant is awarded costs of the case.

DATED, SIGNED AND DELIVERED ON THE 29TH DAY OF SEPTEMBER, 2023

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Applicant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

