



**Amukabwa v Glacier East Africa Limited (Cause 386 of 2017)
[2023] KEELRC 2164 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2164 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 386 OF 2017
NZIOKI WA MAKAU, J
SEPTEMBER 21, 2023**

BETWEEN

KEVIN SHAPAYA AMUKABWA CLAIMANT

AND

GLACIER EAST AFRICA LIMITED RESPONDENT

JUDGMENT

1. The Claimant sued his erstwhile employer M/s Glacier East Africa Limited. Vide his Memorandum of Claim dated 17th February 2017, the Claimant prays for judgment against the Respondent for:
 - a. A declaration that the termination of the employment of the Claimant amounted to summary dismissal.
 - b. A declaration that the Claimant is entitled to payment of his terminal dues as pleaded above.
 - c. An order for the Respondent to pay the Claimant his dues totaling to Kshs. 338,319/-.
 - d. Costs of this claim.
 - e. Certificate of service for the period served.
2. The Claimant averred that he was employed by the Respondent in December 2014 as a cleaner. He averred that his service to the Respondent was diligent and that he worked until April 2016. He averred that he lost his sister and sought 3 days off to attend her burial and that on return after the 3 days period of mourning, he found his colleagues had been paid their salaries but he was not. The Claimant averred that he never received a hearing before his termination and that despite efforts to have the issue resolved, the Respondent did not reinstate him to employment. The Claimant thus sought one month's salary, 12 month's salary as compensation for the unlawful dismissal, housing allowance and leave days not taken. He also sought costs of the suit and the certificate of service.



3. The Respondent did not defend the claim despite being duly served with summons and the memorandum of claim. The Respondent only filed a Memorandum of Appearance dated 23rd March 2017 on 25th April 2017 but never filed a response. The case thus proceeded in the absence of the Respondent. The matter proceeded under Rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and the Claimant therefore presented his final submissions for consideration.
4. The Claimant submitted that he had annexed his Staff Identification bearing the name of the Respondent herein, Glacier East Africa Limited. It was submitted that the staff ID shows that he was stationed to work at CFC Gikomba Branch. The Claimant urged the court to find that this staff card prima facie established existence of subsisting employment relationship. It was submitted that despite having an opportunity to rebut its authenticity, the Respondent did not do so. The Claimant submitted that he had annexed his Kenya Commercial Bank Kenya Limited Personal Account Statement and the highlighted entries show monthly payments to him by the Respondent from 1st September 2015 through to 4th March 2016. He submitted that as salaries are paid in arrears, it is clear from this statement that the March 2016 was not paid as pleaded.
5. The Claimant cited section 44(1) of the *Employment Act* which provides that “Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.” He submitted that in this case, the employer was not given any form of notification to the Claimant dismissing him. The Claimant only learnt this by realizing that his position had been taken by someone else. He submitted that his dismissal hence fell within the ambit of section 44 of the Act. The Claimant submits that his dismissal of the Claimant from employment was substantively and procedurally unfair because the Respondent did not comply with section 41(2) of the *Employment Act* as the Claimant was never issued with any letter indicating the grounds upon which the Respondent was considering to and that they finally dismissed him from employment on. He was not accorded a hearing opportunity.
6. The Claimant cited the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, where the Court of Appeal stated: “There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
7. The Claimant cited section 43 of the *Employment Act* which places an obligation on the employer to prove reasons for determination, and where the employer fails to do so, the termination shall be deemed to have been unfair. The Claimant submitted that none was proffered in his case. Further, it was submitted, section 47(5) of *Employment Act* places the burden of proving wrongful dismissal on the employee and the burden of justifying the dismissal on the employer. The Claimant submits that the person who had supposedly been brought in to hold fort when the Claimant was on a 3 - day compassionate leave was retained and this cemented his fears of having been dismissed. It was submitted that it would have been unreasonable to continue reporting to work after when in April 2016, no pay was given him. The Claimant submitted that he had proved that there was no substantial reason existed to trigger his termination.
8. It was submitted that the Respondent never issued any letter to the Claimant giving reasons why it was contemplating dismissing him from employment as required by section 44(3) and (4) of the



Employment Act. The Claimant cited a decision by Mbaru J. in the case of Abigael Jepkosgei Yator & another v China Hanan International Co. Ltd [2018] eKLR that:

“19. Where work records are not produced, any claim made by an employee with regard to terms and conditions of employment must be taken as the truth. The employer therefore must serve justice and attend court and even where such attendance is not found necessary; the submission of work records is a legal requirement.”

9. The Claimant submitted that the Respondent therefore did not have a good cause as to why it dismissed the Claimant from employment and that therefore, the dismissal was substantively unfair. The Claimant submitted that the entire spirit of section 41 of the Employment Act was offended by this particular termination of employment as the Respondent further failed to provide the employee with a decision either terminating the contract of service. The Claimant submits that his dismissal was therefore procedurally unfair. The Claimant submits that in this case there was a total non-adherence to the dictates of statute and that since the summary dismissal was without substantive justification and procedurally flawed, the Claimant is entitled to the notice pay as pleaded owing to the Respondent’s wrong. He submitted that considering the circumstances surrounding the summary dismissal including the lack of substantive fairness coupled with the procedural flaws during the said dismissal, he urged the Court find that the Claimant is entitled to compensation pursuant to the provisions of section 49(1)(c) of the Employment Act 2007 and to the extent of 12 months’ salary. The Claimant further highlights the Respondent’s misleading conduct of setting up the Claimant for unwarranted distress in having him continue him working alongside a “holding person” only to fail to pay the Claimant and in effect replace him the person who had held fort in his position.
10. The Claimant cited section 31(2) of the Employment Act which gives the employer three options: to provide housing, pay house allowance or pay a consolidated salary. It was submitted that in this case, the Respondent did not do any of the three and it can be deduced that the Respondent did not pay a consolidated salary since according to the basic minimum monthly wages 2015, the Claimant who worked as a cleaner was to be paid Kshs. 10,954.00 which is exclusive of house allowance. The Claimant submitted that he is therefore entitled to housing allowance at the rate of 15% of his monthly salary for 15 months which amounts to Kshs. 22,894/-. The Claimant cited the case of Grain Pro Kenya Inc. Limited v Andrew Waitbaka Kiragu [2019] eKLR where the court while calculating the house allowance that the Appellant was entitled to stated that 15% is a reasonable percentage that employee spends from part of salary to pay rent. The Claimant submitted that throughout his employment, he had never gone for leave except for the three days that he had requested for an off and is therefore entitled to the accrued leave. He submits that owing to the absence of a written contract and a pay slip as required by the Employment Act and in the absence of a documents showing otherwise, he urged that the court finds the statutory burden the Act placed on the Respondent hereto was undischarged.
11. The Claimant submitted that under section 28 of the Employment Act, annual leave of at least 21 days is an entitlement of every employee who has been in continuous service for a period of at least one year and that he was therefore entitled to the leave dues sought in his pleadings. The Claimant submitted that section 51 of the Employment Act obligates every employer to issue a departing employee with a Certificate of Service. As none was given, the Claimant urged the court to order compliance by the Respondent. The Claimant thus urged the case be allowed as prayed with costs.
12. The Claimant was constructively dismissed after leaving his workplace on a 3 day compassionate leave following the demise of his sister. The Respondent has been unable to show cause for the dismissal and as such is liable for the constructive dismissal of the employee. The Claimant worked as a cleaner and the provisions of the Regulation of Wages (General)(Amendment) Order 2015 were that a cleaner



in Nairobi would be entitled to Kshs. 10,954.70 exclusive of housing allowance. The Claimant earned Kshs. 10,175/- a month. He therefore was not only underpaid but also denied house allowance. He sought a sum of Kshs. 22,894/- as unpaid house allowance which he is entitled to recover. He did not seek the difference on salary caused by the Respondent's failure to pay the proper wage and therefore will not recover in that regard. He sought leave pay of Kshs. 8,218/- and he shall also be entitled to the same. He shall also have one month's salary as notice. The Claimant was dismissed in a callous manner and considering the circumstances surrounding his dismissal, to wit, the demise of his sibling, the Respondent should meet the maximum compensation allowable. The Claimant shall be entitled to receive Kshs. 122,100/- as compensation. In the final analysis, I enter judgment for the Claimant against the Respondent as follows:-

- a. Kshs. 22,894/- as unpaid house allowance
- b. Leave pay of Kshs. 8,218/-
- c. Kshs. 10,175/- as notice pay
- d. Kshs. 122,100/- as compensation
- e. Costs of the suit
- f. Certificate of service.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2023

NZIOKI WA MAKAU

JUDGE

