



**Ogalo v Skytrade Global Enterprises Limited (Cause E025 of 2023)
[2023] KEELRC 2272 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2272 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E025 OF 2023
M MBARŪ, J
SEPTEMBER 21, 2023**

BETWEEN

BENERARD OTIENO OGALO CLAIMANT

AND

SKYTRADE GLOBAL ENTERPRISES LIMITED RESPONDENT

JUDGMENT

1. On 15 October 2022 the respondent employed the claimant as a quantity surveyor at a salary of Kshs. 149,704 per month.
2. The claim is that on 10 March 2023 the claimant received a call from Mehrad Zadeh a director of the respondent who told him that his employment contract had been terminated with immediate effect and that he should hand over his duties the next day. There was no notice issued or reasons given for such action or payment of terminal dues.
3. The claimant's case is that his employment was unfairly terminated by the respondent because he was not given any reason or given a hearing over any matter of his conduct and is claiming the following terminal dues;
 - a. Notice pay Ksh. 149,407;
 - b. Salary for 10 days in March 2023 Ksh. 57,464.23;
 - c. Unpaid leave for 6 months Ksh. 60,337.41;
 - d. Unpaid house allowances for 6 months Ksh. 134,466.30;
 - e. Unremitted NHIF deductions for 6 months Ksh. 10,200;
 - f. Unremitted NSSF deductions for 6 months Ksh. 12,960;



- g. Overtime pay Ksh. 155,159.80;
 - h. 12 months' compensation for unfair termination of employment Ksh. 1,792,884; and
 - i. Costs of the suit.
4. The claimant testified that he was employed by the respondent on 15 October 2022 and placed on probation and on a three months' renewable contract which was renewed for an indefinite period but he only worked for 6 months when his employment was terminated without notice. He was not issued with any warning or issued with any notice to show cause. A message was sent through the WhatsApp of the office by the director Mehrad who directed him to attend at the office for the handing over. The claimant asked to be provided with his KRA P9 form, notice pay, termination letter, certificate of service and salary slips for the months worked and to be paid for the leave days earned which was not done.
5. In reply, the respondent's case is that the claimant was an employee and the CEO called him with notice terminating his probationary contract. The claimant was given a formal warning on 14 December 2022 and a notice to show cause on 20 February 2023 and a disciplinary notice on 9 March 2023 but he failed to attend leading to termination of his employment through letter dated 10 March 2023.
6. The failure by the claimant to attend to the notice to show cause and the disciplinary hearing led to termination of his employment and his terminal dues are only payable upon clearance with the respondent as directed in the notice dated 10 March 2023.
7. The claimant worked for 5 months only and under section 28 of the Employment Act he is only entitled to leave pay for 8 ¾ days. No house allowance is due since the claimant did not have a basic wage and the claim should be dismissed with costs.

No witness was called.

The respondent filed work records.

8. At the close of the hearing, both parties filed written submissions which are analysed and the twin issues for determination are whether there was unfair termination of employment and whether the remedies sought should issue.
9. The respondent as the employer filed various work records with regard to the claimant as required under section 10(6) and (7) of the Employment Act, 2007 (the Act).
10. By contract dated 15 October 2022, the respondent employed the claimant as the quantity surveyor for three months' subject to renewable upon job satisfaction.
11. On 9 January 2023 the respondent issued the claimant with Extension Of Probation Contract following assessment of his work performance for the last three months and on the need to further evaluate his job suitability, he was given another three months after which a proper assessment would be conducted.
- That meant the extension would lapse on 31 March 2023.
12. The respondent filed notice dated 20 February 2023, a show cause notice to the claimant over his numerous unsatisfactory aspects of his work performance particularly his failure to pick calls when vital operations were ongoing, delay in dispatch of bitumen leading to cancellation of orders by clients, failure to monitor heating of bitumen to the required standards and a mismatch in qualities with terminal and the office and fundamentally his failure to respond to emails seeking clarifications on pertinent operations of the company.



13. The claimant testified that he was not served with this notice but in his evidence he testified to the matters therein that he worked in a very sensitive and volatile environment and in some terminal phones and phone calls were not allowed. He could not respond to any calls while at the operational areas. However, upon exit from such sensitivity terminals, he did not make any effort to address the matters addressed by the respondent.
14. A notice to show cause issued by the employer and once served upon the employee, such is lawful and in compliance with the provisions of section 41 of the Act. An employee who is called to respond to any matter by the employer must stop all else and respond as failure to do so is tantamount to failure to take instructions and proper direction by the employer and subject to summary dismissal in terms of section 44(4) (e) of the Act.
15. Was the claimant served with the warning and notice to show cause? From the evidence and what he testified to, these notices were within his knowledge and he intricately spoke and testified of their contents. The respondent, despite not calling any witness, the records filed confirm notices issued to the claimant.
16. Invited to show cause, the claimant failed to comply. Such justified summary dismissal without notice but the respondent opted to terminate his employment through notice dated 10 March 2023 but not out of the gross misconduct but on the company has decided to terminate your three months' probationary contract dated 15 October 2022 as extended on January 9, 2023.
17. The initial contract was on three months only. There was no probation clause as stated. The extension of the alleged probationary contract is non-existent save the respondent only formalised the employment relationship.
18. As held in the case of *Monica Munira & others v Mount Kenya University and the Attorney General* [2021] eKLR the bench held that an employee on probation is entitled to notice and a hearing before termination of his employment. Intrinsically, the claimant, in a contract supposedly on probation through letter dated 9 January 2023 had his contract terminated on the basis that he was still on probation yet the extension of such probation is without his consent or approval as required under section 42(2) of the Act. Fundamentally, the invocation of the probationary terms did not apply.
 - (2) A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.
19. The claimant was found to be of gross misconduct for failure to respond to the notice to show cause, but the respondent opted to terminate his employment without. Notice pay is due in terms of section 35 of the Act, based on the option taken by the respondent.

The claimant was earning Kshs. 149,407 which is due in notice pay.
20. With regard to compensation, on the finding that the claimant was of gross misconduct due to his refusal to respond to the show cause issued by the respondent, he had a warning letter issued during his short time in employment, the court is required to put such matters into account in terms of section 45(5) of the Act;
 - 5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial court shall consider—



- (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
 - (b) the conduct and culpability of the employee up to the date of termination;
 - (c) ...
 - (d) ...
 - (e) the existence of any previous warning letters issued to the employee.
21. On his conduct, the claimant having been notified to address and he failed to respond, the warning issued, to award compensation would be to reward gross misconduct and zero (0) award is issued.
22. On the claim for salary for 10 days worked in March 2023, such is due in terms of section 18 (4) of the Act;
- (4) Where an employee is summarily dismissed for lawful cause, the employee shall, on dismissal be paid all moneys, allowances and benefits due to him up to the date of his dismissal.
23. On a gross salary of Ksh. 149,407, for 10 days, a salary of Ksh. 49,803.
24. In terms of section 28 of the Act, leave pay earned under a year is at the rate of three quarter (0.75) days per month. for the 5 months served, on the gross salary of Ksh. 149,407 the leave pay due is Ksh. 18,301.
25. On the claim for house allowance, the claimant was not earning a basic wage to claim in house allowance.
26. On the claim for unremitted NSSF and NHIF, such are statutory payments not due to the employee but to the statutory body.
27. Accordingly, judgment is hereby entered for the claimant against the respondent in notice pay of Kshs. 149,407, leave pay Kshs. 18,301 and 10 days' salary for 49,803 to be paid upon clearance and issuance of Certificate of Service. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 21ST DAY OF SEPTEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

