



**Ogweno v Karanja & another (Cause 1136 of 2018)  
[2023] KEELRC 2683 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2683 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1136 OF 2018  
SC RUTTO, J  
OCTOBER 27, 2023**

**BETWEEN**

**ALFRED OGWENO ..... CLAIMANT**

**AND**

**LAWRENCE MWANGI KARANJA ..... 1<sup>ST</sup> RESPONDENT**

**JOSHUA TURMAN OGWARA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant brought the instant suit by way of a Memorandum of Claim through which he avers that he is a former employee of the Respondents, having been employed as a lecturer for a contract period of 3 years. The Claimant avers that on 29<sup>th</sup> July 2015, he was issued with a letter of suspension and subsequently terminated from employment on 11<sup>th</sup> September 2015. The Claimant has termed his termination unfair and unlawful hence seeks the following reliefs against the Respondents jointly and severally:
  - a. A declaration that the dismissal of the Claimant was unfair and/or unlawful;
  - b. The sum of Kshs 924,000/=;
  - c. Interest on (b) at court rates until payment in full; and
  - d. Costs of the suit.
2. Upon being served with the Memorandum of Claim, the Respondents jointly entered appearance and filed a Response through the firm of Kamotho Njomo & Company Advocates. Through the Response, the Respondents admitted the employment relationship and averred that the Claimant was sent on compulsory leave to facilitate investigations on the issues raised by the Director of the Lake Institute of Tropical Medicine. The Respondents further averred that the Claimant was invited for a disciplinary hearing to answer to charges of gross misconduct and unsatisfactory performance of his



duties. That the Claimant did not appear for the disciplinary hearing. The Respondents maintained that the Claimant was guilty of gross misconduct hence they were entitled to terminate his contract. Consequently, the Respondents asked the Court to dismiss the Claim with costs.

3. On 14<sup>th</sup> July 2022, the Court allowed an Application dated 18<sup>th</sup> May 2022 by the Respondent's Advocate to cease acting for them in the matter. As a result, the Respondents were unrepresented moving forward.
4. The matter proceeded for hearing on 21<sup>st</sup> June 2023 in absence of the Respondents who failed to make any appearance despite being served with the hearing notice as appropriate.

### **Claimant's case**

5. At the trial, the Claimant testified in support of his case and at the outset, sought to rely on his witness statement as well as the documents filed alongside his Claim to constitute his evidence in chief.
6. It was the Claimant's evidence that in July 2015, the Head of Community Health Department locked examination papers in his office and went with the office keys. He averred that the institute Directors accused him of failing to pick up the office keys from the Head of Community Department. According to the Claimant, the accusation was malicious and false as the Head of the Department had already left the Institute without notice.
7. The Claimant further stated in evidence that he was suspended as the Principal of the Institute through a letter dated 29<sup>th</sup> July 2015. He waited to hear from the Board but they did not communicate with him. The Claimant further stated that he was not allowed to respond to the accusations levelled against him.
8. His employment was thereafter terminated through a letter dated 11<sup>th</sup> September 2015 and his termination backdated to 29<sup>th</sup> July 2015. He further contended that the institute did not pay him salary during the period of suspension.
9. Concluding his testimony in chief, the Claimant asked the Court to allow his Claim as prayed.

### **Respondent's case**

10. As stated herein, the Respondents did not participate in the hearing hence did not call oral evidence.

### **Submissions**

11. Placing reliance on the case of *Pamela Nelima Lutta vs Mumias Sugar Co. Ltd* (2017) eKLR, the Claimant submitted that the Respondents did not follow proper procedure and establish a valid reason to warrant his dismissal from employment. It was further submitted by the Claimant that the Respondent did not inform him of the reasons for the termination of his employment, did not issue him with a show cause and did not invite him to face a disciplinary panel. To this end, the Claimant submitted that his termination was not in accordance with the mandatory provisions of the law. In support of the Claimant's arguments, the Court was invited to consider the determination in the case of *National Bank of Kenya vs Anthony Njue John* (2019) eKLR.

### **Analysis and determination**

12. I have considered the issues raised in the pleadings as well as the evidence on record and the following issues stand out for determination: -
  - a. Whether the Claimant's termination from employment was unfair and unlawful; and
  - b. Is the Claimant entitled to the reliefs sought?



## Unfair and unlawful termination?

13. The *Employment Act*, 2007 prohibits unfair and unlawful termination from employment. With respect to this, an employer is required to prove that an employee's termination was fair substantively and procedurally. Sections 41, 43 and 45 of the *Employment Act* are the key statutory provisions as they set the legal parameters for determining whether the employer acted justly and fairly in all respects in terminating the employment of an employee.
14. Pursuant to Section 43(1) of the *Employment Act*, an employer is required to prove the reason or reasons for the employee's termination, and where it fails to do so, such termination shall be deemed to have been unfair within the meaning of Section 45.
15. And further, Section 45 (2) (a) and (b) of the *Employment Act*, qualifies an employee's termination from employment as unfair where the employer fails to prove that the reason for the termination is valid, fair, and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
16. Back to the case at hand, the reason for the Claimant's termination as captured in his letter of termination was "gross misconduct". Notably, there was no elaboration beyond that. Therefore, given the generality of the accusation against the Claimant, it was not clear what acts or omissions he was culpable of, as to constitute gross misconduct.
17. In terms of Sections 43(1) and 45(2) (a) and (b) of the *Employment Act*, the Respondents being the employers in this case, had the heaviest responsibility in terms of proof. Therefore, they had the onus of proving that the reasons leading to the Claimant's termination were fair, valid and related to his conduct, capacity and compatibility. As it is, the Respondents did not adduce evidence in whatever form or manner, hence it did not discharge its burden to that extent.
18. There being no evidence to back up the Respondents' case, it may very well be said that the reason for the Claimant's termination was not substantiated in any way. What's more, failure by the Respondents to call oral evidence impaired their case in a fundamental way.
19. In the circumstances, I arrive at the inevitable conclusion that the Respondents did not discharge the evidential burden under Sections 43(1) and 45 (2) (a) and (b) of the *Employment Act* hence the Claimant's termination was unfair in substance.
20. On the question of process, Section 45(2) (c) of the *Employment Act*, requires an employer to prove that an employee's termination was undertaken in accordance with fair procedure. Section 41(1) of the *Employment Act* sets out the specific requirements of a fair process. The requirements entail notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a union representative of his or her own choice.
21. In this case, the Respondents stated in the Response that the Claimant was invited for a disciplinary hearing to answer to the charges levelled against him but he failed to show up. Be that as it may, the record states otherwise as the Respondents' assertions were not supported by evidence. For instance, there was no evidence that the Claimant was invited to a disciplinary hearing.
22. In addition, there was no evidence of a notice issued to the Claimant detailing the allegations levelled against him and informing him that the Respondent was considering terminating his employment based on the same. Similarly, there was no evidence that a hearing was convened and the Claimant's absence noted.



23. If anything, the Claimant's letter of termination makes reference to a Board meeting held on Saturday, 31<sup>st</sup> August 2015 to deliberate on his case. There is no mention, let alone the slightest indication that the Claimant was part of the said meeting. There was further no indication that he had been invited for the deliberations but failed to make an appearance. What I can deduce from the foregoing is that the meeting convened to deliberate on the Claimant's case, proceeded in his absence, hence he was not afforded an opportunity to ventilate his defence in answer to the allegations levelled against him.
24. In the premises, I am led to conclude that the Respondents did not act in compliance with the requirements stipulated under Section 41 of the Employment Act, hence the Claimant's termination was unlawful within the meaning of Section 45 (2) (c).
25. The total sum of my consideration is that the Claimant's termination was both unfair and unlawful in terms of Sections 41, 43 and 45 of the Employment Act.

### **Reliefs?**

26. Having found that the Claimant's termination was unfair and unlawful, the Court holds that he is entitled to compensation under Section 49(1) (c) of the Employment Act. Consequently, the Claimant is awarded compensatory damages equivalent to seven (7) months of his gross salary. This award takes into consideration the length of the employment relationship as well as the fact that the Respondents neither proved the reasons for the Claimant's termination nor the fact that they complied with the requirements of a fair process in so doing.

### **Orders**

27. In the final analysis, I enter Judgment in favour of the Claimant against the Respondents jointly and severally in the following manner: -
  - a. A declaration that the termination of the Claimant's employment was unfair and unlawful.
  - b. The Claimant is awarded compensatory damages in the sum of Kshs 294,000.00, being equivalent to 7 months of his gross salary.
  - c. Interest on the amount in (b) at court rates from the date of Judgment until payment in full.
28. The Claimant shall also have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF OCTOBER, 2023**

**STELLA RUTTO**

**JUDGE**

Appearance:

For the Claimant Mr. Ojuok instructed by Mr. Modi

For the Respondent No appearance

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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 Civil 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.

**STELLA RUTTO**

**JUDGE**

