



**Mwangi v Goodman Agencies Limited (Cause E318 of 2020)
[2023] KEELRC 2575 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2575 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E318 OF 2020
JK GAKERI, J
OCTOBER 19, 2023**

BETWEEN

FREDRICK MURIUKI MWANGI CLAIMANT

AND

GOODMAN AGENCIES LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 20th July, 2020 alleging unfair termination of employment by the Respondent.
2. The Claimant avers that he was employed by the Respondent on 3rd May, 2019 under a 3 year contract due to lapse on 12th May, 2022 at a consolidated salary of Kshs.102,500/= and reported to the Regulatory and Compliance Manager but worked closely with the Storage Manager on technical aspects.
3. It is the Claimant's case on 8th January, 2020, the Storage Manager, one Zeituna requested him to follow up on two hygrometers suspected to be faulty and did so the following day confirming that they were faulty and had to be returned to the seller for replacement or compensation.
4. The Claimant further avers that on 20th March, 2020, while engaged in his tasks, he was summoned to the boardroom for a meeting by the Chief Executive Officer, Dr. Gubara, where the CEO's Personal Assistant, Chief Operations Manager Sales and Human Resource Manager were also present.
5. That he was accused of sexually harassing an employee which he denied and was shown the footage showing him in the storage room.
6. That he was also accused of having been in the store irregularly.



7. That he explained his presence in the store and only the CEO spoke during the meeting and he placed on suspension on accusations of sexual harassment. That his employment was terminated on 1st April, 2020.
8. The Claimant faults the termination variously, including; was not issued with a notice to show cause, opportunity to defend himself denied, unaware of the policy on sexual harassment and the allegations were unsubstantiated.
9. The Claimant prays for;
 1. Declaration that termination of employment was in violation of Sections 43 and 45 of the *Employment Act* and thus unfair.
 2. Declaration that the termination was in breach of the Claimant's employment contract.
 3. An order for compensation as follows;
 - i. Unpaid salary arrears in March 10 days, Kshs.48,809.52
 - ii. 12 months compensation Kshs.1,230,000.00
 - iii. Unremitted Pension Benefit, Kshs.22,468.00Total Kshs.1,301,277.52
 4. General and exemplary damages for malicious termination of employment.
 5. Costs of this suit.
 6. Interest on (3) at court rates from the date of filing the suit.
 7. Interest on (5) above from the date of judgement.
 8. Any other relief the court may deem fit and just to grant.

Respondent's case

10. The Respondent admits that the Claimant was its employee engaged under a 3 year fixed term contract.
11. That when he proceeded to the store on 9th January, 2020, he failed to adhere to the Standard Operating Procedures (SOPs) on store management and the Respondent received a complaint on sexual harassment from a female employee who alleged to have been touched inappropriately.
12. It is the Respondent's case that the Claimant's employment was terminated for failure to comply with Standard Operating Procedures.
13. That in his response, vide an email dated 23rd March, 2020, the Claimant admitted that he reached into the pockets of the female employee without her consent.
14. According to the Respondent, the Claimant was accorded a fair hearing before termination of employment.
15. It is the Respondent's case that it paid the Claimant Kshs.111,725.00 and does not owe him anything.



Claimant's evidence

16. On cross-examination, the Claimant testified that the request by Zeituna on 8th January, 2020 were acted on on 9th January, 2020 and he prepared a report which he did not file. He admitted having reached out to Zeituna's pocket for a dangling earphone without consent.
17. That he responded to the suspension letter vide an email dated 23rd April, 2020.
18. The Claimant admitted having been paid the salary for the month of March and leave days and was claiming salary arrears of Kshs.48,809.52 but was paid for January, February and March 2020 and had seen the Respondent's tabulations of his dues.
19. The Claimant admitted having acknowledged that he had no other claims against the Respondent and was paid.
20. The Claimant confirmed that he had no evidence that pension was not being remitted and had only worked for 10 months.
21. On re-examination, the Claimant testified that he had assisted the Store Manager with earphones and she had indicated that she would not return them and he had merely tried to reach for the earphones.
22. That he was not given a chance to appear with another employee.

Respondent's evidence

23. RWI, confirmed on cross-examination that the Claimant was supposed to assist the Store Manager.
24. That the Store Manager did not make any claim and the Respondent had not filed its Human Resource Policy.
25. The witness testified that the Claimant was not given a written notice to show cause as required by the Human Resource Policy.
26. That neither the Store Manager nor other person had complained of sexual harassment.
27. It was her evidence that from the video, one could not tell what communication took place between the Claimant and the Store Manager.
28. That Human Resource conducted investigations but no report was prepared.
29. The witness confirmed that the reason for suspension and termination of employment was two fold.
30. Finally, the witness confirmed that the Claimant was entitled to respond to the allegations made.

Claimant's submissions

31. Counsel addressed two issues touching on termination of employment and entitlement to the reliefs sought.
32. On termination, Counsel relied on the provisions of Section 45(2) of the *Employment Act* and the sentiments of the Court in *Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR* among others to urge that for a termination of employment to pass muster, it had to be shown that there was substantive justification for the termination coupled with procedural fairness.
33. Counsel submitted that termination of the Claimant's employment was unfair.



34. Reliance was also made on the sentiments of Lord Denning in *British Leyland UK Ltd V Swift* (1981) I.R.L.R 91 on the “band of reasonableness test” in termination of employment to urge that the Respondent had failed to provide a valid and fair reason for termination of the Claimant’s employment.
35. Counsel further submitted that the Respondent had no sexual harassment policy and did not show which Standard Operating Procedures the Claimant had not complied with.
36. On procedural fairness, counsel relied on the decisions in *Kenfreight (EA) Ltd V Benson K. Nguti* (2010) eKLR, *Loice Otieno V Kenya Commercial Bank Ltd* (2013) eKLR and *Jane Nyandiko V Kenya Commercial Bank* (2017) eKLR to urge that the provisions of Section 41 of the *Employment Act* were not complied with as the Claimant was not issued with a notice to show cause, was not given an opportunity to defend himself and was denied the right of representation at the hearing.
37. As regards the reliefs sought, counsel submitted that the Claimant was entitled to compensation for termination of employment. Several decisions were cited to buttress the submission.
38. Puzzlingly, no submissions were made on the other claims.

Respondent’s submissions

39. Counsel isolated 3 issues for determination, namely;
 - i. Whether the reason for termination was valid.
 - ii. Whether the procedure followed was fair.
 - iii. Whether the Claimant is entitled to the reliefs sought.
40. On the reason for termination of employment, reliance was made on the provisions of Section 43 of the *Employment Act*, 2007 to urge that the Claimant had conducted himself in an inappropriate manner towards a female employee and conducted his roles in an unacceptable manner.
41. That the Claimant had admitted that he implemented instructions a day after they were given.
42. That he also admitted reaching out into the female employee’s pocket, was informed of the allegations of sexual harassment and his explanation was unsatisfactory which led to termination of employment.
43. The sentiments of the Supreme Court and the Court of Appeal in *Judicial Service Commission V Gladys Boss Sholei* (2014) eKLR and *Co-operative Bank of Kenya Ltd V Banking Insurance & Finance Union (K)* (2017) eKLR, *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others* (2019) eKLR were relied upon.
44. On the procedure adopted by the Respondent, counsel submitted that the procedural requirements were complied with as the Claimant was invited for a meeting on 20th March, 2020 and given a suspension letter which required his submissions on the allegations made which he did and employment was terminated as the explanation as unsatisfactory.
45. As regards the reliefs sought, counsel urged that since the Claimant had admitted having received the sum of Kshs.111,725/= as salary for the days worked in March 2020, notice pay and untaken leave days and agreed that he had no further claims against the Respondent, he had no other claims against the Respondent having contributed to the termination of employment.



46. Counsel further submitted that the prayer for unremitted pension was not substantiated. The sentiments of the court in *David Namu Kariuki V Institute of Policy Analysis and Research* (2019) eKLR were relied upon to buttress the submission.
47. On general and exemplary damages, counsel submitted that the Claimant led no evidence to prove his entitlement and cited the sentiments of the court in *Godfrey Julius Ndumba Mbogori & another V Nairobi City County* (2018) eKLR and *Kenya Broadcasting Corporation V Geoffrey Wakio* (2019) eKLR to urge that the Claimant could not claim general damages in addition to compensation under the *Employment Act*, 2007.
48. According to the Respondent's counsel, termination of the Claimant's employment was fair in every respect.

Findings and determination

49. The issues for determination are;
 - i. Whether termination of the Claimant's employment was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
50. On the first issue, counsel for the parties adopted opposing positions as is typical. While the Claimant's counsel submitted that the Respondent had no valid reason to terminate the Claimant's employment and violated the procedural tenets, counsel for the Respondent submitted the opposite, that the Respondent had a valid reason to terminate the Claimant's employment and adopted a fair procedure.
51. In determining whether a termination of employment was unfair or not, the court is enjoined to evaluate the evidence and make findings of fact as to whether the employer had a valid and fair reason to terminate the employee's employment and did so in accordance with a fair procedure as ordained by the provisions of Sections 41, 43, 45(2) and 47(5) of the *Employment Act*, 2007 and as restated by courts in legions of decisions. The employer must evidentiary demonstrate that he/she/it had a substantive justification to terminate the employment and adopted a fair procedure as by law required.
52. In *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, Ndolo J was emphatic that;

“. . . For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also 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 to effect the termination.”
53. The Court of Appeal expressed similar sentiments in *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR.
54. I will now proceed to apply the foregoing provisions and proposition of law to the facts of the instant case.

Reason for termination

55. It is common ground that on 8th January, 2020, the Respondent's Store Manager, one Zeituna requested the Claimant to follow up on some two Hygrometers that were faulty and he did so on the following day and ascertained that they were indeed faulty and needed replacement.



56. It is also not in contest that on 20th March, 2020, the Claimant was invited and attended an unplanned meeting of the Chief Executive Officer where Heads of Department were present.
57. It is unclear as to what transpired during the meeting as the Respondent availed neither the list of attendees nor minutes. According to the Claimant, only the Chief Executive Officer spoke at the meeting and accusations were levelled against him.
58. The uncontroverted evidence of the Claimant is that after the meeting, he was given a suspension letter dated 20th March, 2020.
59. The suspension letter accused the Claimant of visiting the stores for an unknown assignment and sexual harassment of an unnamed female staff.
60. The letter instructed the Claimant to make written submissions by 23rd March, 2023.
61. The suspension was expressed as pending investigations estimated to take one (1) month except where police investigations were involved. The letter was explicit that if the investigation results proved otherwise, he would be “reinstated with full pay and benefits.”
62. A casual reading of the suspension letter reveals that it did not particularize the allegations made against the Claimant namely the Standard Operating Procedure allegedly violated by his going to the stores or what he had done to the female staff and how it amounted to sexual harassment.
63. The Claimant responded by an email dated 24th April, 2020 at 11.24 am explaining why he was at the store on 19th March, 2020 and why he returned to the stores. He admitted having reached for earphones Zeituna had in her pocket but she did not allow him to pick them. This appears to be the incident captured by the CCTV camera.
64. The Respondent did not avail this critical piece of evidence in hard or soft copy.
65. Similarly, the termination letter dated 24th March, 2020 makes reference to investigations and the findings of non-compliance with Standard Operating Procedures on stores management and instructions given by the Manager.
66. The letter makes no reference to the alleged sexual harassment.
67. Significantly, the Respondent’s witness confirmed that the Human Resource conducted investigations but no report was prepared.
68. Instructively, the witness was not an employee of the Respondent as she joined in August 2020. Her evidence on there having been an investigation or not was conjectural and thus of no probative value.
69. From the evidence on record, it is not difficult to find that the Respondent did not conduct any investigation and if it did, no report was prepared as none existed.
70. Significantly, the Claimant’s employment was terminated days after the suspension letter and the day after he responded to the suspension letter. When did the investigation, if any, take place?
71. Regrettably, the Respondent filed neither its Human Resource Policy or Standard Operating Procedures nor the sexual harassment policy to demonstrate that what the Claimant was accused of was indeed contrary to its ethics, procedures or policies and its employees were fully aware of the contents.
72. Evidence of the duration within which instructions must be actioned by the instructee would have enabled the court assess whether the Claimant was acting in defiance or acted within the prescribed duration.



73. Granted that the instructions were given at 11.46 am on 8th March, 2020, it would also have assisted the court if the Respondent had demonstrated the Claimant's work schedule on that day or week.
74. It is also unclear as to when the Claimant proceeded to the stores on 9th March, 2020. Was it in the morning, mid-morning or late afternoon?
75. The allegations the Claimant was facing were serious as they implicated his professionalism at the workplace and clear evidence was critical.
76. It does not help for the Respondent to accuse the Claimant for violating unknown Standard Operating Procedures (SOPs).
77. In the absence of clear evidence on the SOPs infringed by the Claimant, the court is not persuaded to find that acting on instructions of the supervisor a day they were issued would typically amount to gross misconduct to warrant a dismissal.
78. The pith and substance of the Respondent's case on this issue is that the Claimant admitted having reached out to the Store Manager's pocket to pick his earphones.
79. The Respondent's witness admitted that part of the Claimant's duty was to assist the Store Manager.
80. The Respondent adduced no evidence to controvert the Claimant's testimony that the earphones were his.
81. Equally, the Respondent tendered no evidence to establish how the Claimant and the Store Manager related in the office and most importantly whether the Store Manager lodged a complaint of sexual harassment.
82. The allegations the Claimant faced required thorough investigations and both parties had to provide evidence on what had transpired on that day as neither the letter of suspension nor termination or email make reference to a complaint against the Claimant.
83. Needless to gainsay, Section 6 of the *Employment Act, 2007* outlaws sexual harassment at the work place and prescribes what constitutes sexual harassment. It is unclear to the court as to which provision of Section 6(1) was violated by the Claimant.
84. The allegation of sexual harassment of a female staff by the Claimant was exclusively based on a video not availed to the court which allegedly showed the Claimant and the Store Manager and as RWI confirmed on cross-examination, no one could tell what the two were saying or said to each other.
85. In other words, it is Respondent's case that reaching into the pocket of a female employee to pick earphones amounts to sexual harassment.
86. The Respondent is raising an interesting issue as to whether there can be sexual harassment without a victim.
87. Puzzlingly, the Respondent neither averred nor testified that it questioned the Store Manager on the incident since it adduced no evidence to establish that she lodged a complaint or that she perceived the Claimant's conduct as sexual harassment.
88. In sum, the Claimant was accused of sexual harassment because the Respondent interpreted his acts on video to amount to sexual harassment of the Store Manager.



89. In the absence of the Store Manager's evidence on the occurrence of 9th March, 2020, the court is not persuaded that the Respondent had reasonable grounds to genuinely believe that the Store Manager was sexually harassed by the Claimant. Her evidence would have been determinative of the matter.
90. The court is not persuaded that the instant case falls within the band of reasonableness as explained by Lord Denning in *Leyland (UK) Ltd V Swift (Supra)*.
91. For the above-stated reasons, it is the finding of the court that the Respondent has failed to prove on a balance of probabilities that it had a valid and fair reason to terminate the Claimant's employment.

Procedure of termination

92. As held in *Pius Machafu Isindu V Lavington Security Guards Ltd (Supra)*, Section 41 of the [Employment Act, 2007](#) prescribes an elaborate and mandatory process which employers are enjoined to comply with before terminating the employment of an employee.
93. Courts on the other hand have in legions of decisions itemised the specific requirements of Section 41 of the [Employment Act, 2007](#) as exemplified by the sentiments of the court in *Loice Otieno V Kenya Commercial Bank (Supra)* and *Postal Corporation of Kenya V Andrew K. Tanui (2019) eKLR* such as explanation of the grounds in a language understood by the employee, reason for which termination of employment is being considered, right to the presence of another employee of his choice during the explanation, hearing and considering the representations by the employee and/or the person chosen by the employee.
94. In this case, although the Claimant's counsel faulted the Respondent for not having sent a notice to show cause to the Claimant, the letter of suspension dated 20th March, 2020 though lacking in particularity makes certain allegations against the Claimant and demanded his response by Monday 23rd March, 2020 and the Claimant responded by email on 24th April, 2020.
95. In the court's view, the Respondent's letter served as a suspension letter and notice to show cause.
96. The foregoing notwithstanding, it is common ground that the provisions of Section 41 of the [Employment Act, 2007](#) were not complied with in that the Respondent did not conduct a hearing. The Claimant was not accorded an opportunity to confront the evidence relied upon by the Respondent and the accuser, if any.
97. After the response to the suspension letter, the Claimant was not invited for a hearing and his employment was terminated on the following day.
98. The notice of invitation to the hearing would have notified the Claimant that he had the right to be accompanied by a fellow employee of his choice or a shop floor representative if he was a member of a union.
99. In the absence of a hearing, there was no opportunity to make representations or their consideration by the disciplinary committee.
100. The foregoing is fortified by the sentiments of the Court of Appeal in *Postal Corporation of Kenya V Andrew K. Tanui (Supra)* as follows;

“ . . . It said nothing about the Respondent appearing with another employee of his choice. The retort that an employer has no obligation to ask the employee to be accompanied does not avail the appellant because the law requires that such other person be present to hear the grounds of termination and if so inclined, make representations thereon. A hearing not



so conducted is irregular. At the board meeting, there is no evidence that an explanation of the grounds of termination was made to the Respondent, and if so, in what language . . .”

101. These sentiments apply on all fours to the circumstances of this case where the Claimant was not invited for a hearing of the allegations facing him.
102. From the foregoing, it is the finding of the court that the Respondent has failed to demonstrate that termination of the Claimant’s employment was procedurally fair within the meaning of Section 45 of the *Employment Act*, 2007.

Appropriate Reliefs

a. Declaration

103. Having found that termination of the Claimant’s employment was unfair for want of a substantive justification and procedural fairness, a declaration to that effect is merited.

b. Unpaid salary arrears 10 days in March

104. The Claimant confirmed on cross-examination that he was paid for the days worked in March 2020. The prayer is unsustainable and is accordingly dismissed

c. Unremitted Pension Benefit

105. The Claimant adduced no scintilla of evidence to establish this claim.
106. The written statement makes no reference on when the amount claimed was not remitted or to whom.
107. Neither a payslip nor pension statement was availed to demonstrate the Respondent’s failure. The prayer is dismissed.

d. Compensation

108. Having found that termination of the Claimant’s employment was unfair, the Claimant is entitled to the reliefs provided by Section 49(1)(c) of the *Employment Act*, 2007 on compensation of upto a maximum of 12 months salary.
109. In determining, the quantum of compensation, the court has considered that;
 - i. The Claimant was an employee of the Respondent for a fairly short period of about 9 months.
 - ii. The Claimant substantially contributed to the termination of employment.
 - iii. The Claimant did not appeal the Respondent’s decision.
 - iv. The Claimant did not demonstrate his wish to continue in the Respondent’s employment.
110. In the circumstances, the court is satisfied that the equivalent of 3 months salary is fair.

e. General and exemplary damages

111. The Claimant adduced no evidence of entitlement to general and exemplary damages.
112. While the latter is designed to punish and deter, the former is compensatory similar to (d) above which is a statutory remedy. The two cannot be granted for the same ground.



113. Relatedly, the Claimant failed to prove that the termination of his employment was malicious.

The prayer is unsustainable and is dismissed.

114. In conclusion, judgement is entered for the Claimant against the Respondent as follows;

- a. Declaration that termination of the Claimant's employment by the Respondent was unfair.
- b. Equivalent of 3 months gross salary.
- c. Costs of this suit.
- d. Interest at court rates from the date hereof till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH DAY OF OCTOBER 2023

DR. JACOB GAKERI

JUDGE

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 15th March 2020 and subsequent directions of 21st 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 has 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.

DR. JACOB GAKERI

JUDGE

