



REPUBLIC OF KENYA



KENYA LAW
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**Wachira v Proshade Kenya Limited (Cause E885 of 2021)
[2023] KEELRC 3435 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3435 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E885 OF 2021
NZIOKI WA MAKAU, J
NOVEMBER 29, 2023**

BETWEEN

FAHAD KENNEDY WACHIRA CLAIMANT

AND

PROSHADE KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against the Respondent seeking damages for wrongful and unfair termination of his employment and payment of his salary and terminal dues. It was the Claimants' averment that the Respondent employed him as a Project Designer and Renderer in May 2017 and on or about 30th January 2018, formalised his employment on a fixed term renewable contract for three years termed as 'Offer for Employment'. That on 1st February 2019 and subsequently on 1st February 2020, his employment contract was renewed on fixed term renewable contracts for three years with effect from the said dates. He averred that he performed his duties exemplarily throughout the years that he was promoted to lead designer with a team that he was supervising and additionally received a raise in salary from Kshs. 50,000/- from his initial 2018 contract to Kshs. 100,000/-. The Claimant averred that in April 2020, the Respondent issued a directive to all its employees to work from home due to the Covid-19 pandemic to ensure safety of all its employees. That his employment was then marred by late payment of salary such as his salary for May and June 2020 were paid on 1st July 2020 and 20th August 2020 respectively while his accrued salary for July and August 2020 was paid on 7th and 26th October 2020 respectively. It was the Claimant's averment that he received a Notice of Suspension on 16th December 2020 for alleged misconduct but which notice did not disclose what he was being accused of. That on 22nd February 2021, he was issued with a Notice of Invitation for a Disciplinary Hearing on 24th February 2021 and despite the short notice, prepared himself for the said hearing. According to the Claimant, the disciplinary hearing held as scheduled was not properly constituted



and was marred by unfairness, irregularity and procedural impropriety. That his contract was thereafter terminated on 13th May 2021 effective immediately and his last day of work was 12th June 2021.

2. The Claimant's case was that termination of his employment was unfair, unprocedural and unlawful because the Respondent neither gave him any valid and fair reason for the termination nor explained to him the alleged misconduct. Furthermore, the length of time accorded to him to prepare for the disciplinary hearing was very short and inadequate and that due process leading to the eventual termination was not followed. He also cited the Respondent's failure to pay his terminal dues in lieu of notice. The Claimant further contended that he had never been made familiar with the Respondent's HR Policy before or after signing his employment contracts. He asserted that he was thus entitled to damages, salaries from September 2020 until April 2021, 13 days worked but unpaid in May 2021 and a declaration that termination of his employment by the Respondent was illegal, unprocedural and unfair. He also prayed for interest on the payments sought at 14%p.a from the date of filing this suit and for cost of the suit.
3. In his Witness Statement, the Claimant asserted that at his disciplinary hearing, he was called upon to answer to charges of 'soliciting for work' but when his accuser was contacted, he denied that the Claimant solicited. He further asserted that he was terminated from employment for asking for his pay and that he had suffered mental pain and anguish following the unlawful termination.
4. The matter proceeded on formal proof as the defendant refused to participate in the suit.
5. The Claimant submitted that section 41 of the *Employment Act* has made it mandatory for employees to be subjected to procedural fairness before being terminated. That from the onset, he was just served with notices of Suspension and invitation to the disciplinary that did not particularise the aspect of misconduct he was being asked to answer to. He cited the case of *Sani v JSC* (Cause 7 of 2019) [2022] KEELRC 4000 (KLR) (26 September 2022) wherein Radido J. relied on the case of *OH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Ors* (2019) 40 ILJ 2477 in which the Labour Appeal Court of South Africa opined:

“One of the key elements of fairness is that an employee must be made aware of the charges against him. It is always best for the charges to be precisely formulated and given to the employee in advance of the hearing in order to afford a fair opportunity for preparation. The charges must be specific enough for the employee to be able to answer them. The employer ordinarily cannot change the charge or add new charges after the commencement of the hearing, where it would be prejudicial to do so..... It normally will be sufficient if the employee has adequate notice and information to ascertain what act of misconduct he is alleged to have committed.”
6. The Claimant further submitted that the short notice to prepare for a defence or even seek to have a work colleague accompany him for the hearing was against the rules of natural justice and prejudiced and occasioned a miscarriage of justice in violation of his right under Article 50(1) and (2)(a) and (c) of the *Constitution* of Kenya. That the disciplinary proceedings were also flawed because only the Director Mr. Lemi Mwendar and the Operations Manager Ms. Elizabeth Chaghu were present contrary to the persons that had been outlined in the Invitation to the disciplinary hearing and which violation undermined the integrity and impartiality of the process. It was the Claimant's submission that the Respondent had failed to discharge the onus of proving that it acted fairly and procedurally in terminating his employment.
7. On substantive fairness, the Claimant cited sections 43(1) and 45(1) of the *Employment Act* requiring proof of the reason or reasons for the termination, failure which the termination is deemed unfair. He



submitted that therefore in the absence of a reason advanced for termination of his employment, it could only be deduced that the termination was unfair. It was the Claimant's submission that having demonstrated that the termination of his employment was marred by both procedural and substantive unfairness, he was entitled to damages as pleaded being one month's salary in lieu of notice and 12 months' gross salary as compensation for the financial losses and emotional distress caused by the unlawful termination. On this submission, he relied on the case of *Kenfreight (EA) Limited v Benson K. Nguti* [2019] eKLR and affirmed the remedies under section 49 of the *Employment Act*. On the unpaid salaries, he submitted that the Respondent had claimed in the notice of termination that it had put the Claimant on half salary beginning the month of December until his termination but never at any point issued him with any policy depicting the same. That it could thus be concluded that the same was an arbitrary decision of the Respondent aimed at punishing him by denying him his rightful dues. The Claimant finally prayed that the costs of the suit be borne by the Respondent.

8. The Claimant was terminated after the Respondent held what it deemed a disciplinary hearing but was not. The Claimant was invited to a "disciplinary hearing" in a span of 2 days. In the case of *Donald Odeke v Fidelity Security Ltd* [2012] eKLR Ndolo J. held that:

...an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them. The learned Judge went ahead to add that it does not matter what offence the employee is charged of. If the employee is not heard, the termination is ipso facto unfair. [emphasis mine]

9. In my considered view, the length of time accorded to the Claimant to prepare for the meeting held was very short, inadequate and unjust. The Claimant did not have adequate time to prepare for the disciplinary hearing. The Court therefore finds that due process leading to the eventual termination was not followed. An employee is entitled to a proper hearing. Fair administrative action consists not in ticking off boxes, but in actual fair administrative action. Where the law provides that a party should be heard, the party is not heard with the dictates of natural justice at play, the ensuing dismissal is faulted for not according with section 41 of the *Employment Act*. The same triggers a finding that the compensation under section 49(1)(c) as read with sections 41, 43 and 45 of the *Employment Act* lies. The Court therefore finds for the Claimant:

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2023

NZIOKI WA MAKAU

JUDGE

