



REPUBLIC OF KENYA



KENYA LAW
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**Anemba v Shalom Paradeisos (Cause 1899 of 2017)
[2023] KEELRC 2886 (KLR) (10 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2886 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1899 OF 2017
SC RUTTO, J
NOVEMBER 10, 2023**

BETWEEN

JOSEPH ANEMBA CLAIMANT

AND

SHALOM PARADEISOS RESPONDENT

JUDGMENT

1. The Claimant instituted the suit herein vide a Memorandum of Claim dated 4th September 2017, in which he avers that he was employed by the Respondent as an Accountant on a monthly salary of Kshs 25,000/=. He avers that he was not issued with a letter of employment and that he worked throughout the week including weekends and public holidays without pay. It is the Claimant's case that he worked diligently and honestly throughout his employment. He further states that on or about 7th June 2017, he was summarily dismissed from employment without any valid reason, audience and without payment of his terminal dues. Consequently, the Claimant seeks against the Respondent the sum of Kshs 535,000/= being notice pay, leave allowance, unpaid house allowance, service pay and compensatory damages.
2. Upon being served with the Memorandum of Claim and Notice of Summons, the Respondent entered appearance through the firm of GSLAW LLP but did not file any defence or such other document in response to the Claim.
3. On 14th March 2018, the Court certified the matter as undefended and directed that it be fixed for formal proof hearing.
4. Subsequently, the matter came up for formal proof hearing on 26th July 2023 during which the Claimant testified in support of his case.



Claimant's case

5. The Claimant adopted his pleadings to constitute his evidence in chief. He testified that he was employed by the Respondent as an accounting officer in charge of its restaurant which was inside a church compound. It was the Claimant's evidence that he used to work from 8:00 am to 8:30 am and was not paid overtime allowance. He further averred that he was not given accommodation and was not paid house allowance.
6. With regards to the allegations of theft, the Claimant stated that he was cleared by the Police after they viewed the CCTV footage and confirmed that he was not there at the material time. However, the management told him and another colleague that since they were heading the restaurant, they should take responsibility. He appealed to the Respondent but they did not listen to him. That instead, the Respondent employed his brother who was working as a casual, to take over his position. It was his evidence that this affected him a lot. He was further affected by the allegations of theft which he says, tarnished his name, as he used to fellowship in the same church where he used to work.
7. According to the Claimant, he was not anticipating his dismissal hence he suffered tremendous financial embarrassment as he could not meet his basic financial needs.
8. Concluding his testimony in chief, the Claimant asked the Court to allow his claim as prayed.

Submissions

9. The Claimant submitted that the Respondent did not notify him of his termination. That further, he was not given an opportunity to defend himself and the reasons for his termination. Placing reliance on the determinations in *Kenya Union of Commercial Food and Allied Workers vs Meru North Farmers SACCO and Anthony Mkala vs Malindi Water and Sewerage Company Limited*, the Claimant further submitted that his termination was unfair for lack of a valid reason.

Analysis and determination

10. Flowing from the pleadings on record as well as the evidentiary material placed before Court, the issues falling for determination can be distilled as follows: -
 - a. Was the Claimant's termination unfair and unlawful?
 - b. Is the Claimant entitled to the reliefs sought?

Unfair and unlawful termination?

11. In terms of the *Employment Act, 2007* (Act), termination of employment ought to be substantively and procedurally fair. Substantive fairness entails proof of reasons for which an employee was terminated, while procedural fairness has everything to do with the procedure applied in terminating an employee from employment. Fundamentally, an employer must justify that there was reason to terminate the services of an employee and that such termination was undertaken in accordance with fair procedure.
12. I will proceed to apply the two elements to the case herein.
13. With regards to substantive justification, Section 43(1) of the Act, places the burden of proving the reasons for termination on an employer and in default, such termination is rendered unfair. In addition, Section 45 (2) (a) and (b) of the Act, provides that a termination of employment is unfair where the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on its operational requirements.



14. Essentially, far beyond providing reasons for termination, an employer is required to prove that the same meets the fairness and validity test.
15. In the instant case, there is no letter of termination hence the reasons for the Claimant's termination cannot be ascertained therefrom. Be that as it may, in its response to the Claimant's Advocate's demand letter, the Respondent stated that the Claimant was terminated on grounds of gross misconduct and negligence. It went ahead to describe the particulars of the said allegations in the demand letter.
16. In light of the statutory provisions aforesaid, the Respondent was required to prove the reason for the Claimant's termination and more importantly, prove that the said reasons were fair and valid.
17. As stated herein, the Respondent did not file a defence nor participate in the hearing hence did not tender oral evidence. Indeed, the assertions contained in the demand letter remain just that, assertions. If anything, the said response does not constitute pleadings hence do not count.
18. The net sum of the foregoing is that the Respondent did not justify the reasons for which the Claimant was terminated. To this end, the Claimant's assertions that his termination was unfair were not discounted by the Respondent in any way.
19. What this boils down to, is that the Claimant's termination was unfair in substance within the meaning of Sections 43 (1) and 45(2) (a) and (b) of the Act.
20. Turning to the question of procedural fairness, Section 45 (2) (c) of the Act, requires an employer to prove that an employee's termination from employment was in accordance with fair procedure. Section 41(1) of the Act elaborates what entails a fair process. In line with this, an employer is required to notify an employee of the intended termination in a language he or she understands and in the presence of another employee or a shop floor union representative.
21. In this case, the Claimant stated that he was abruptly terminated and was not given audience prior to the said termination. As the Respondent did not file a defence or participate in the hearing, the Claimant's assertion was not controverted.
22. As it is, there is no evidence that the Respondent notified the Claimant of the reasons for which it was contemplating his termination. Similarly, there was no evidence to prove that the Respondent gave the Claimant an opportunity to tender his defence against whatever allegations prior to his termination.
23. Therefore, this leads me to the inescapable conclusion that the Respondent did not undertake a disciplinary hearing or such related process contemplated under Section 41 of the Act prior to terminating the Claimant from its employment.
24. In analyzing the import of section 41 of the Act, the Court of Appeal had this to say in the case of *Postal Corporation of Kenya vs Andrew K. Tanui* [2019] eKLR: -

“It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with. The section provides for: -

.....

Four elements must thus be discernible for the procedure to pass muster:-

- (i) an explanation of the grounds of termination in a language understood by the employee;
- (ii) the reason for which the employer is considering termination;



- (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”

25. I fully adopt and reiterate the above position, particularly on the mandatory nature of the provisions of Section 41.
26. The total sum of my consideration is that the Claimant’s termination was unfair and unlawful as it fell below the legal parameters stipulated under Sections 43(1) and 45(2) of the Act.
27. Having found as such, I now turn to consider the reliefs available to the Claimant.

Reliefs?

28. Having found that the Claimant’s termination was unfair and unlawful, I will award him compensatory damages equivalent to five (5) months of his salary. This award has been informed by the length of the employment relationship as well as the fact that the Respondent did not prove that the Claimant’s termination was fair in substance and procedure.
29. I further award the Claimant one (1) month’s salary in lieu of notice as the Court has found that his termination was unlawful.
30. The Claimant is also awarded service pay for three (3) years as the Respondent intimidated in its response to the demand letter, that he was entitled to the same.
31. The Claimant sought to be paid leave allowance for the three (3) years he served the Respondent. In this case, the Respondent did not produce the Claimant’s leave records in line with its obligations under Section 74(1) (f) of the Act. Therefore, the Claimant is entitled to payment in lieu of leave not taken. Be that as it may, in light of Section 28(4) of the Act, the same shall be limited to 18 months preceding his exit from the Respondent’s employment.
32. With regards to the claim for house allowance, the Claimant has sought to be paid the sum of Kshs 97,500.00 on grounds that he was not housed nor paid house allowance.
33. Payment of a house allowance is a statutory requirement and is couched in mandatory terms. In terms of Section 31(1) of the Act, an employer is bound to either provide an employee with reasonable housing accommodation or payment of a sufficient sum as rent in addition to the basic salary as will enable the employee to obtain reasonable accommodation. This payment is commonly referred to as house allowance.
34. The Act has not provided what constitutes a reasonable sum as housing allowance. In this regard, I will draw guidance from the decision by the Court of Appeal in the case of Grain Pro Kenya Inc. Ltd vs Andrew Waithaka Kiragu[2019] eKLR where it was determined that 15% is a reasonable percentage that an employee spends from part of a salary to pay house rent.
35. Therefore, as part of his salary, the Claimant was entitled to payment of at least 15% of his basic salary as house allowance.
36. In this case, it is notable that the Claimant’s contract of employment was not exhibited. Therefore, it is not possible to ascertain whether the salary payable to him was inclusive of house allowance. In the circumstances, I have to turn to the relevant Minimum Wage Order prescribing salary for the category of workers as the Claimant.



37. According to the Claimant, he was employed as an Accountant. In terms of Legal Notice No. 197 of 2013, the minimum statutory wage payable to a storekeeper was Kshs 22,070.95 This was exclusive of house allowance. Therefore, in total, he was entitled to a minimum consolidated salary of Kshs 25,381.60 (being 15% of Kshs 22,070.95 + Kshs 22,070.95). Therefore, from April 2014 upto 30th April 2015, his salary did not constitute house allowance. The balance being the sum of Kshs 381.60 per month.
38. With regards to the period beginning 1st May 2015 upto 30th April 2017, the statutory minimum wage payable to the workers in the category of the Claimant was Kshs 24,719.50. Pursuant to Legal Notice No. 116 of 2015, he was entitled to a minimum consolidated salary inclusive of house allowance in the sum of Kshs 28,427.40 (being 15% of Kshs 24,719.50 + Kshs 24,719.50). What this translates to, is that the Claimant was not paid house allowance to the tune of Kshs 3,427.40 per month.
39. In respect of the period starting 1st May 2017 upto 7th June 2017, the statutory minimum wage payable to workers in the category of the Claimant was Kshs 30,627.45. Inclusive of house allowance, he was entitled to a minimum consolidated salary of Kshs 35,221.56 (being 15% of Kshs 30,627.45 + Kshs 30,627.45). This is pursuant to Legal Notice No. of 111 of 2017. Therefore, for this period, it is evident that the Claimant's salary was exclusive of house allowance and he is entitled to the sum of Kshs 10,221.56 per month.
40. Flowing from the foregoing, it is clear that the Claimant's monthly salary did not constitute house allowance as by law required. Therefore, the Claimant is entitled to the compensation equivalent to the unpaid house allowance.

Orders

41. Accordingly, I enter Judgment in favour of the Claimant against the Respondent in the following manner: -
- a. A declaration that the Claimant's termination by the Respondent was unfair and unlawful.
 - b. The Claimant is awarded compensatory damages in the sum of Kshs 125,000.00 which sum is equivalent to five (5) months of his salary.
 - c. The Claimant is awarded accrued leave pay in the sum of Kshs 26,250.00.
 - d. The Claimant is awarded the sum of Kshs 97,439.96 (Kshs 381.60*13 months) + (Kshs 3,427.40*24 months) + (Kshs 381.60*1 month) being unpaid house allowance from 1st April 2014 upto 31st May 2017.
 - e. The Claimant is awarded the sum of Kshs 37,500 being Service pay for three (3) years worked.
 - f. The total award is Kshs 286,189.96.
 - g. Interest on the amount in (f) at court rates from the date of Judgment until payment in full.
 - h. The Claimant shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2023.

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STELLA RUTTO

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 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

