



**Njeri v Khalif Modern Homes Ltd (Employment and Labour Relations Appeal E138 of 2022) [2023] KEELRC 2890 (KLR) (10 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2890 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E138 OF 2022**

**SC RUTTO, J  
NOVEMBER 10, 2023**

**BETWEEN**

**MAGDALENE GITARI NJERI ..... APPELLANT**

**AND**

**KHALIF MODERN HOMES LTD ..... RESPONDENT**

*(Being an Appeal against the Judgment delivered on 15th July, 2022, in the Chief Magistrate's at Nairobi MCELRC No. E1984 of 2021 by Hon. Principal Magistrate E.M Kagoni)*

**JUDGMENT**

1. The Appellant commenced a suit by way of a Statement of Claim at the Chief Magistrate's Court at Milimani being CMEL No. E1984 of 2021. Through the Statement of Claim, the Appellant averred that she was employed by the Respondent as a property advisor. Her contract was to subsist from 1<sup>st</sup> February 2021 to 8<sup>th</sup> February 2022. She averred that her employment was terminated on 8<sup>th</sup> September 2021. According to the Appellant, she was not accorded a hearing and was not informed why she was being terminated from employment. Terming her termination from employment unprocedural and illegal, the Appellant sought declaratory orders against the Respondent as well as the sum of Kshs 165,000/= being the salary for the remainder period of her contract. She further sought for payment of commission due to her, terminal dues and benefits, issuance of a Certificate of Service and general damages for breach of her rights under *the Constitution*.
2. The Respondent opposed the Claim by filing a Response to the Statement of Claim through which it admitted the employment relationship but denied terminating the contract of the Appellant. The Respondent further averred that if such termination occurred, it was done in accordance with the terms of the contract which was signed by both parties. The Respondent further denied that the termination of the Appellant was unprocedural and illegal. To this end, the Respondent asked the Court to dismiss the Appellant's claim with costs.



3. Upon considering the totality of the evidence on record, the learned trial Magistrate delivered Judgment in favour of the Respondent upon finding that the Appellant was not unlawfully terminated. In so finding, trial Court observed that the termination of the Appellant's employment was in line with the contract executed by the parties. In the end, the Court dismissed the Appellant's Claim with costs.

### **The Appeal**

4. Aggrieved by the Judgment of the trial Court, the Appellant lodged the instant Appeal through which she raises the following grounds: -
  1. The Learned Magistrate erred in facts and law in failing to find that the Respondent had unfairly terminated the Appellant.
  2. The Learned Magistrate erred in fact and law by disregarding the authorities of the Appellant which stipulate the rationale for unfair termination.
  3. The Learned Magistrate erred in fact and law by failing to appreciate that in termination there has to be substantive fairness.
  4. The Learned Magistrate erred in fact and law by failing to consider that in termination there has to be procedural fairness.
  5. The Learned Magistrate erred in fact and law by failing to consider that no disciplinary process of termination was undertaken by the Respondent before terminating the Appellant.
  6. The Learned Magistrate erred in fact and law by failing to consider that both procedural fairness and substantive fairness are vital whilst determining termination of an employee.
  7. The Learned Magistrate erred in fact and law by failing to consider that since the Appellant was not accorded any opportunity to be heard then the termination process was unfair.
  8. The Learned Magistrate erred in fact and law by failing to consider that since the Respondent failed to conduct disciplinary hearing then the termination process was illegal.
  9. The Learned Magistrate erred in law and fact by failing to observe that it is a mandatory requirement to comply with the principles of natural justice in event of termination.
  10. The Learned Magistrate erred in law and fact by failing to consider that termination to be fair one has to be given fair opportunity to be heard.
  11. The Learned Magistrate erred in fact by failing to consider that since the Respondent failed to offer any reason for termination then the termination was unfair.

### **The Submissions**

5. The Appeal was canvassed by way of written submissions. On her part, the Appellant submitted that fair labour practices entail the issue of having termination of an employee conducted in a fair and just manner by the employer. That further, fair labour practices dictate that an employee should not be terminated unlawfully. The Appellant argued that in this case, she was terminated without issuance of any reasons and neither was she given an opportunity to be heard.
6. In further submission, the Appellant submitted that there was no disciplinary hearing and the Respondent has failed to prove as much as it did not produce minutes or any relevant documents.



7. According to the Appellant, her termination was not carried out in compliance with the parameters set out in Section 41 of the [Employment Act](#) and was procedurally unfair.
8. On the other hand, the Respondent submitted that the termination of the Appellant's employment was well within the contractual terms of the Contract of Employment. That it was not a matter of termination as a result of misconduct as alleged by the Appellant but that the Respondent invoked a contractual right.
9. It was further submitted that the Respondent invoked its right as per the contract to prematurely end the contract based on Clause 6 of the contract, and also did so by giving a seven day notice in writing as per the contract.
10. In further submission, the Respondent stated that at the time of hiring, the Appellant had voluntarily agreed to the terms of the contract that included clause 6, that she was not unduly influenced, coerced, or forced into signing the same, and that she freely signed it. The Respondent urged that the Appellant did not challenge the validity of the contract in the trial Court so that it can be vitiated. In support of this position, the Respondent placed reliance on the determinations in [Manuel Anidos v Kinangop Wind Park Limited \(In Receivership\)](#) [2019] eKLR and [Kenya Revenue Authority v Menginya Salim Murgani](#) [2010] eKLR.
11. In the Respondent's view, the termination was lawful and on the basis of a contractual right and was not on the basis of summary dismissal as alleged by the Appellant.

### **Analysis And Determination**

12. This being the first appellate Court, it is mandated to re-evaluate the evidence before the trial Court as well as the Judgment and arrive at its own independent determination on whether or not to allow the appeal. The Court is further empowered to subject the entire evidence to a fresh scrutiny and draw its own conclusion bearing in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand. Such was the determination in *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123.
13. Accordingly, I have re-evaluated the evidence that was presented before the trial Court, the opposing submissions, as well as the law and isolated the following issues for determination: -
  - a. Whether the Respondent has proved that it had a justifiable reason to terminate the Appellant's employment;
  - b. Whether the dismissal of the Appellant by the Respondent was in line with the requirements of a fair process; and
  - c. Whether the remedies sought by the Appellant lie in law.

### **Justifiable Reason?**

14. Section 43(1) of the [Employment Act](#) (Act) places the burden of proving the reasons for termination on the employer and in default, such termination is rendered unfair. There is more. Section 45 (2) of the Act, qualifies a termination of employment unfair where the employer fails to prove that the reason for the termination of an employee's contract of service was valid, fair and connected to the employee's conduct, capacity or compatibility; or based on its operational requirements.



15. Succinctly put, for termination of employment to meet the legal threshold, an employer must justify that it had a justifiable reason to terminate the services of the employee. It is also instructive to note that the burden of proof lies with the employer.
16. Turning to the instant case, it is noteworthy that both parties did not exhibit the Appellant's letter of termination hence the reasons for her termination cannot be ascertained therefrom.
17. In his testimony before the trial Court, the Respondent's witness, Mr. Abdirahman Hussein, stated that he could not recall the reason for the Appellant's termination.
18. Therefore, the reasons for the Appellant's termination were not made clear to the Court below and in this Court.
19. According to the Respondent, the Appellant's employment was terminated in accordance with clause 6 of the contract of employment which provided for a notice period of seven days or payment of salary in lieu of notice. That in this case, the Appellant was paid the sum of Kshs 15,000/= in lieu of notice.
20. Applying the provisions of Sections 43(1) and 45(2) (a) and (b) of the Act, to the case herein, the Respondent was not only required to provide the reasons for the Appellant's termination but prove that the same were valid, fair and related to her conduct, capacity, compatibility or its operational requirements.
21. As stated herein, no reasons were proffered for the termination of the Appellant's employment hence there was nothing to justify and or apply the test under Section 45(2) (a) and (b) of the Act. In this regard, I cannot help but question whether the Appellant's employment was terminated on account of her conduct, capacity, compatibility, or the Respondent's operational requirements. Either way, the Respondent was bound to assign reasons for the Appellant's termination and prove that the same were fair and valid.
22. In light of the foregoing, it is evident that the Respondent failed the test of substantive fairness and indeed, it can very well be said that the Appellant was in the dark with regard to the real reasons behind her termination from employment.
23. I further find it imperative to emphasize that the days when an employer would terminate an employee without proffering any reasons are long gone. The *Employment Act*, 2007, heralded a new way of managing termination of employment contracts hence any termination from employment must be accompanied by reasons that are fair, valid and related to the employee's conduct, capacity or compatibility. As rightly stated by the Court of Appeal in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR: -

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

24. Having found that the Respondent did not prove the reasons for the Appellant's termination as required under Sections 43 and 45(2) (a) and (b) of the Act, I am persuaded that it failed to discharge its legal burden at the trial Court by proving that it had a valid and fair reason to summarily dismiss the Appellant from employment.



25. Accordingly, the Appellant's termination was substantively unfair and the finding by the learned Magistrate was without basis.

### **Fair Process?**

26. The requirement of a fair process is generally provided for under Section 45 (2) (c) of the Act. Further, Section 41 (1) of the Act makes specific requirements with regards to the process to be complied with by an employer. It entails notifying the employee of the allegations levelled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.
27. From the record, it is discernible that the Appellant was terminated contrary to the requirements stipulated under Section 41 of the Act. It is further apparent from the record that the Appellant was only given seven days' notice prior to her termination but was not issued with a notification that the Respondent was contemplating terminating her employment on whatever grounds.
28. What's more, there is no evidence that the Appellant was invited to render her explanation against whatever allegations the Respondent may have had against her. This leaves no doubt in my mind that the Appellant's termination was not in accord with the provisions of Section 41 of the Act.
29. On this issue, I wholly subscribe to the determination of the Court of Appeal in the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR where the learned Judges reckoned thus: -
- “It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with.....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.”
30. I am further fortified by the determination of the Court of Appeal in the case of *Kenfreight (E.A.) Limited v Benson K.Nguti* (*supra*), where it was held that:-
- “Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken”.
31. Ideally, beyond issuing the Appellant with a notice of termination, the Respondent was required to go a step further and explain to her the reasons for which it was considering terminating her employment in the presence of another employee or a union official in a language that he or she understands.



32. As the Respondent failed to meet the threshold stipulated under Section 45 (2) (c) as read together with Section 41 of the Act, I return that the Appellant's termination from employment was procedurally unfair hence unlawful.
33. Ultimately, the Appellant's termination was unfair and unlawful within the meaning of Sections 41, 43, and 45 of the Act.
34. The finding by the learned trial Magistrate was therefore not in consonance with the facts, evidence and the relevant law. Therefore, he fell into error by holding that the termination of the Appellant's employment was lawful.

#### **Reliefs?**

35. Having found that the Appellant's termination from employment was unfair and unlawful, the Court holds that she is entitled to an award of compensatory damages pursuant to Section 49(1) (c) of the Act. Accordingly, she is awarded damages equivalent to four (4) months of her gross salary. This award takes into account the length of the employment relationship and the fact that the Respondent did not prove that there was a justifiable cause to terminate the Appellant's employment and in so doing, failed to apply a fair process.
36. The claim for salary for the remainder of the Appellant's contract period is declined as the same is in the nature of an anticipatory relief. Therefore, there is no basis for award of the same.
37. The claim for commission is equally declined in that by its very nature, it constitutes a specific claim. The law is settled that a claim for special damages must not only be specifically pleaded but must also be strictly proved with as much particularity as the circumstances permit. In this case, the Appellant did not specifically plead her claim and place before the Court evidence to support her case. As a matter of fact, the Appellant did not state what amount she was claiming as commission due to her. What's more, there is no single document to guide the Court on the commission sought by the Appellant. In the circumstances, the Appellant did not discharge her legal burden of proof to strictly plead and prove her claim.
38. The same fate befalls the claim for terminal dues and benefits.

#### **Orders**

39. The total sum of my consideration is that the Appeal is allowed and the Court makes the following orders: -
  - a. The trial Court's order dismissing the Appellant's suit in its entirety is hereby set aside.
  - b. A declaration that the Appellant's termination by the Respondent was unfair and unlawful.
  - c. The Appellant is awarded compensatory damages in the sum of Kshs 110,000.00 being equivalent to four (4) months of her salary.
  - d. Interest on the amount in (c) at court rates from the date of this Judgment until payment in full.
40. As the Appeal has succeeded, costs in this Court and at the trial Court shall be borne by the Respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2023.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Appellant Mr. Ombis

For the Respondents Mr. Bett

Court Assistant Abdimalik Hussein

**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**

