



**Ismail v Ainushamsi Hauliers Limited (Cause 583 of 2018)  
[2023] KEELRC 2839 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2839 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 583 OF 2018  
JK GAKERI, J  
NOVEMBER 9, 2023**

**BETWEEN**

**ABDI NASIB ISMAIL ..... CLAIMANT**

**AND**

**AINUSHAMSI HAULIERS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Memorandum of Claim filed on 20<sup>th</sup> April, 2018. He alleges that he was unfairly and unlawfully dismissed from employment by the Respondent.
2. The Claimant was employed by the Respondent on 23<sup>rd</sup> January, 2014 as a driver at Kshs.25,000/= per month and was involved in an accident on 23<sup>rd</sup> May, 2015 when Motor Vehicles Registration Number KAU 373U attempted to overtake the vehicle he was driving KBR 037T, thereby forcing him out the road and rolled on impact.
3. The Claimant avers that he was treated at various hospitals including Naivasha hospital, Kijabe, Garissa, St. Mary's Gilgil and Al Amin Nursing Home and was out of work for a long time on treatment on full pay and resumed work.
4. It is the Claimant's case that his employment was terminated on 23<sup>rd</sup> November, 2017 allegedly for short delivery as well as delay in loading and offloading.
5. The Claimant alleges that the termination was without a valid reason and was condemned unheard.
6. The Claimant prays for;
  - a. A declaration that termination of employment by the Respondent was unfair and unlawful.
  - b. Payment of Kshs.807,699.16 comprising;



- i. November 2017 salary Kshs.28,427.43
  - ii. One month's salary in lieu of notice Kshs.28,427.43
  - iii. Accrued leave allowance Kshs.74,976.30
  - iv. Service (45 days x 28,427/26) Kshs.49,201.32
  - v. Underpayment (2014 – 2017) Kshs.178,428.52
  - vi. Public holidays 45 days Kshs.107,109.00
  - vii. 12 months compensation Kshs.341,129.16
- c. Costs and interest of this cause.

### **Respondent's case**

7. The Respondent admits that the Claimant was its employee as alleged and his monthly salary was Kshs.25,380.00 per month and was contractually bound to work for 8 hours per day and rested on weekends and public holidays.
8. That on account of the accident on 23<sup>rd</sup> May, 2015, the Claimant was out of work from 24<sup>th</sup> May, 2015 and December 2016 and the Respondent paid all bills.
9. It is the Respondent's case that the Claimant was not diligent in his work.
10. That although the Respondent requested the Claimant to avail receipts and pending bills for compensation under *Work Injury Benefits Act*, he did not do so after resuming duty.
11. That the Claimant was warned verbally and in writing.
12. The Respondent avers that on 11<sup>th</sup> November, 2018, the Claimant pilfered a customer's goods worth Kshs.120,000/= and was summarily dismissed on 23<sup>rd</sup> November, 2018.

### **Claimant's evidence**

13. On cross-examination, the Claimant confirmed that warning letters on record bore his name. He denied having been invited for a disciplinary hearing or having signed the appointment letter, yet he produced a copy.
14. It was his testimony that he was not given reasons for the termination of employment. A few seconds later, the Claimant admitted that the dismissal letter set out the reasons for termination of employment.
15. He twice confirmed payment of the salary for November 2017.
16. The Claimant testified that although he did not proceed on annual leave, he was on leave from 24<sup>th</sup> May, 2015 to December 2016 for more than one year and was paid salary for the entire duration.
17. As regards service pay, the Claimant testified that his payslip showed that NSSF deductions were being made.
18. On re-examination, the Claimant testified that he did not receive the warning letters, and was given the appointment letter when his employment was terminated.
19. It was his testimony that when he was sick, he was not on leave though not at work.



### **Respondent's evidence**

20. On cross-examination, RWI confirmed that the warning letter dated September 2016 was not on record but the Claimant was at work at the time.
21. That the Claimant refused to acknowledge receipt of warning letters.
22. That the letter of invitation for the hearing did not indicate that the Claimant was entitled to have a representative and the Claimant did not acknowledge receipt of the letter.
23. According to the witness, the weighbridge ticket is dated 11<sup>th</sup> November, 2017 while the goods amounting to 2,306 kilograms were received by Baraka Flour Mills on 18<sup>th</sup> November, 2017 and the Claimant delivered the goods.
24. The witness confirmed that the dismissal letter made no mention of loss of wheat and no counter-offer had been lodged against the Claimant.
25. On re-examination, RWI testified that the Baraka Flour Mills incident happened on 18<sup>th</sup> November, 2017 but the Claimant did not report it and the dismissal was based on the short delivery to Baraka Flour Mills.

### **Claimant's submissions**

26. Counsel isolated no specific issues for determination but addresses the reason for termination, process and the reliefs sought.
27. As regards the reason, counsel submitted that the summary dismissal letter contained vague reasons for termination of the Claimant's employment. That there was no complaint that Baraka Flour Mills received less goods.
28. According to counsel, the reasons given by the Respondent fell below the threshold prescribed by Section 41 and 43 of the [Employment Act](#), 2007.
29. As regards the process, counsel relied on the provisions of Section 41 of the [Employment Act](#) to urge that warning letter, notice to show cause and the invitation for the hearing were not received by the Claimant and the notice to respond was too short.
30. That the letters were an afterthought.
31. According to counsel, the Claimant was entitled to all the reliefs sought including the salary for November 2017 which he admittedly received.
32. On accrued leave days, counsel urged that the Claimant did not proceed on leave.
33. That the Respondent provided no evidence to prove NSSF deductions.
34. On underpayment, counsel relied on the Regulation of Wages Order, 2017 without alluding to the factual basis of the claim.
35. On public holidays, counsel identified the days on behalf of the Claimant to justify the claim for public holidays.



## Respondent's submissions

36. The Claimant isolated two issues for determination;
- i. Whether dismissal of the Claimant from employment was unfair and unlawful.
  - ii. Whether the Claimant is entitled to terminal benefits.
37. On the 1<sup>st</sup> issue, counsel submitted as it was a summary dismissal under Section 44(3) of the *Employment Act*, no notice was necessary as the Respondent relied on Section 44(4)(g) of the Act which encompasses criminal offences.
38. Counsel urged that under Section 43(1) of the *Employment Act*, the requirement for a reason was only necessary when a claim of unfair termination is filed by the employee.
39. Counsel submitted that evidence showed that the Claimant loaded 26,980 Kgs of wheat for Baraka Flour Mills on KBQ 305E on 11<sup>th</sup> November, 2017 but delivered only 23,060 Kgs.
40. That the Claimant did not deny having transported the wheat and did not explain the loss of the wheat.
41. Reliance was made on the sentiments of the court in *Mary Chemweno Kiptui v Kenya Pipeline Co. Ltd* [2014] eKLR on when the reason(s) for termination must be made known to the employee.
42. That although the notice to show cause had no acknowledgement, RWI testified that the letter was given to him physically as he waited to be assigned work but refused to acknowledge receipt.
43. Counsel urged that termination of the Claimant's employment was fair.
44. As regards terminal dues amounting to kshs.807,699.16, counsel cited the provisions of Sections 50 and 49 of the *Employment Act*, 2007 to urge that the Claimant did not adduce evidence to prove that his termination was unfair.
45. Counsel submitted that the payslip on record showed that the Claimant's salary for November 2017 was paid and no pay in lieu of notice was due as the dismissal was summary.
46. The decision in *Phoebv Aloo Inyanga v Stockwell One Homes Management Ltd & another* [2022] eKLR was cited to buttress the argument that the Claimant was not entitled to pay in lieu of notice.
47. On underpayment, counsel contended that he Claimant had not availed evidence to demonstrate the underpayment and availed no documentary evidence in support of the alleged underpayment.
48. Finally, counsel submitted that the Claimant did not provide evidence of the public holidays, had no unutilized leave days and adduced no evidence as to when the 63 days accrued.

### Determination

- i. Whether termination of the Claimant's employment by the Respondent was fair.
  - ii. Whether the Claimant is entitled to the reliefs sought.
49. As to whether termination of employment was unfair, parties have adopted opposing positions with the Respondent maintaining that the termination was fair.



50. As aptly captured by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR;

“ . . . 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.”

51. The foregoing sentiments are founded on the provisions of the *Employment Act*, 2007 which prescribe the architecture of fair termination of employment.

52. The Act has specific provisions and requirements on notice of termination, reason(s) for termination, burden of proof, grounds for summary dismissal, justification of termination and the elements of a fair termination of employment under Sections 41 and 45 of the Act.

### **Reason for termination**

53. It is common ground that the Claimant was employed by the Respondent as a driver and regularly drove motor vehicle registration number KBR 037T which was involved in an accident on 23<sup>rd</sup> May, 2015 leading to an extended treatment period for the Claimant lasting about 10 months during which time the Respondent paid the Claimant’s hospital bills and salary though he was not rendering any service.

54. The driver of motor vehicle registration number KAV 373V ZE 2493 was to blame for the accident.

55. It is also not in dispute that after recovery, the Claimant continued with this work as a driver of motor vehicle KBQ 305E as evidenced by the clearance certificate among other documents. However, neither of the parties could tell exactly when the Claimant resumed duty though it was during the 2<sup>nd</sup> half of the year.

56. In his witness statement, the Claimant admitted that his termination of employment was allegedly on short delivery of goods.

57. Documentary evidence provided by the Respondent reveal that on 11<sup>th</sup> November, 2017, the Claimant loaded a total of 26,980 kilograms of wheat at Grain Bulk Handlers Ltd for delivery to Baraka Flour Mills Ltd in Nairobi. A Goods Received Note from Baraka Flour Mills Ltd, Changamwe Road, Nairobi reveals that the cargo was received on 18<sup>th</sup> November, 2017 from the Claimant ID. No. 24318922 which is reflected in his medical documents and certificate of service as his ID card number.

58. The goods received note indicates that the Claimant delivered a total of 23,060 kilograms of wheat, less than what he loaded at Mombasa more than a week earlier.

59. Neither party adduced evidence on the cause of the delay.

60. Instructively, the Claimant neither denied that he was the driver of the motor vehicle in question nor delivery of the cargo as reflected in the Goods Received Note from Baraka Mills Ltd which captured his details.

61. According to RWI, the short delivery was only discovered when the Consignee of the cargo reported the same to the Respondent, a report the Claimant ought to have made but did not.

62. The fact that the Claimant offered no explanation for the failure to report gives credence to the Respondents evidence that indeed the Claimant delivered less cargo than he had loaded at Mombasa.



63. The short delivery is also evidenced by the Respondent's Operations Incident Report dated 18<sup>th</sup> November, 2017 and the Credit note dated 27<sup>th</sup> November, 2017.
64. Although from the records, other drivers appear to have delivered less wheat as well, the Claimant's short fall was the highest being 3,880 kilograms while the next highest was 320 kilograms, after an allowance of 40 kilograms.
65. The Claimant adduced no evidence to contradict the documentary evidence availed by the Respondent which reveal that he delivered less cargo to a customer
66. Although the Claimant testified that he did not receive the warning letter dated 1<sup>st</sup> November, 2017, notice to show cause dated 18<sup>th</sup> November, 2017 and the invitation for a hearing he admitted having received the termination letter dated 23<sup>rd</sup> November, 2017, the three documents are consistent that the Respondent was concerned about the Claimants attitude to work but more significantly short delivery of products. The notice to show cause, invitation for hearing and the termination letter make reference to the highest short delivery of 3,880 kilograms to Baraka Flour Mills Ltd on 18<sup>th</sup> November, 2017.
67. Section 43(2) of the *Employment Act*, 2007 provides that;
- “The reasons or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”
68. The Claimant contradicted himself as to whether he was given the reason(s) for termination of employment. Initially he had stated that he was not given the reason but when referred to the letter of termination, he changed the story.
69. The same applied to the salary for November 2017 which he is claiming yet he confirmed on cross-examination that it was paid as were the leave days prayed for.
70. For the above-stated reasons, the court is satisfied and finds that the Respondent has on a balance of probabilities demonstrated that it had a valid and fair reason to terminate the Claimant's employment on 23<sup>rd</sup> November, 2017.
71. As regards the procedure employed by the Respondent, the court proceeds as follows;
72. Section 41 of the *Employment Act*, 2007 prescribes the procedural precepts in termination of employment such as explanation of the grounds in a language the employee understands in the presence of another employee chosen by the employee, entitlement of the employee to the presence of a colleague or shop floor representative and hearing and considering the representations, if any by the employee or that other person. (See *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR).
73. As held by the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guard Ltd* [2017] eKLR, the procedural requirements provided by Section 41 of the *Employment Act*, 2007 are mandatory for a termination to pass the fairness test under Section 45 of the Act.
74. In this case, although the Respondent produced a warning letter dated 1<sup>st</sup> November, 2017, notice to show cause dated 18<sup>th</sup> November, 2017 and an invitation to a hearing dated 20<sup>th</sup> November, 2017, and RWI testified that the letters were handed over to the Claimant but he declined to acknowledge receipt, the Respondent adduced no evidence of the other attempts it made to deliver the letters or at least evidence the fact that service was attempted but the Claimant declined service.



75. A note on the letter indicating that service was made on a particular date and time but the same was declined or reference to the refusal in subsequent letters including the termination letters would have availed the Respondent.
76. In the absence of such evidence, the allegation that service was to the Claimant at the place of work, which has been denied cannot avail the Respondent.
77. Equally, the letter inviting the Claimant for a hearing makes no reference of his right to be accompanied by another employee.
78. Finally, the Respondent adduced no evidence to show that the committee convened but could not proceed owing to the Claimant's absence.
79. From the foregoing, it is clear that the Respondent has failed to prove that it conducted the termination of the Claimant's employment in accordance with a fair procedure as by law required.
80. Consequently, it is the finding of the court that termination of the Claimant's employment was unfair for want of procedural propriety.

### **Reliefs**

81. Having found as above, I will now proceed to determine the appropriate reliefs in the circumstances.
  - a. Declaration
82. Having found that termination of the Claimant's employment was procedurally flawed, a declaration that the termination was unfair and unlawful is merited.
  - b. Payment of terminal dues
    - i. November 2017 salary
83. Documentary evidence on record show that the Claimant's salary for November 2017 was paid as submitted by the Respondent's counsel.
84. More significantly, the Claimant confirmed the fact of payment during cross examination.

The prayer is dismissed.

  - ii. One month's salary in lieu of notice
85. Although the Respondent had a valid and fair reason to terminate the Claimant's employment, and bearing in mind that it did not hear him, the court is persuaded that it ought to have paid him in lieu of notice to underscore the gravity of his misconduct or give him notice of termination.
86. The court is in the circumstances inclined to award the Claimant one month's salary in lieu of notice, Kshs.25,380/=.
  - iii. Accrued leave allowance 63 days
87. The Claimant adduced no evidence as to when the days claimed accrued.
88. Neither the written statement nor the oral testimony in court provided the particulars.
89. Although the Claimant initially stated that he did not proceed on leave, he quickly changed and confirmed that he was indeed on leave from 24<sup>th</sup> May, 2015 until December 2016.



90. It is also noteworthy that the Claimant's Clearance Certificate indicates that he had no pending leave days.
91. Whereas there is no dispute that the Claimant was injured in an accident on 23<sup>rd</sup> May, 2015 and was under treatment for a long time, exceeding the duration prescribed by law and the contract on record, it is also not in contest that for the entire duration, he did not render any service and his hospital bills and salary was paid by the Respondent.
92. The absence of the requisite particulars render the claim for accrued leave days unsustainable and it is accordingly dismissed.
- iv. Service
93. The Claimant prays for service for 45 days.
94. Neither the written statement dated 19<sup>th</sup> April, 2018 nor the oral testimony adduced in court make reference to service pay.
95. It is also notable that copies of the Claimant's payslips on record reveal that the Respondent was deducting NSSF contributions, a fact the Claimant confirmed on cross-examination.
96. The Claimant is not entitled to service pay by dint of Section 35(6)(d) of the Employment Act, 2007.
97. The prayer lacks any factual or legal basis and is accordingly dismissed.
- v. Underpayment
98. Although it is common ground that the Claimant was a driver of heavy commercial vehicle, he makes no allegation of having been underpaid by the Respondent at any point.
99. Paragraph 8 (v) of the Memorandum of Claim identifies underpayment as a relief without any allegation or evidence of actual underpayment.
100. Neither the written statement on record nor the oral testimony led in court demonstrate the fact and extent of the underpayment alleged.
101. In the absence of evidence of underpayment, the prayer is declined.
- vi. Public holidays
102. The Claimant prays for compensation or having worked on 45 public holidays but neither the written statement nor the oral testimony adduced in court provide the necessary particulars.
103. The written statement makes no reference to the allegation that the Claimant worked on any public holiday.
104. Since every year has specific public holidays, it is unclear to the court as to how the 45 days were arrived at.
105. Needless to emphasis, this is a claim for special damages and must be pleaded and proved.
106. It behoves the Claimant to establish that he worked during a particular public holiday.
107. In his submissions, counsel for the Claimant attempted to identify the public holidays in an attempt to demonstrate the Claimant's case on this prayer.
108. It is trite that submissions are neither pleadings nor evidence and are a marketing tool for the party's respective cases.



The prayer is dismissed.

vii. Maximum compensation

109. Having found that termination of the Claimant's employment was procedurally flawed, the Claimant is eligible for the relief of compensation under Section 49(1)(c) of the *Employment Act*, 2007 upto a maximum of 12 months gross salary but subject to the provisions of Section 49(4) of the Act.
110. In determining the quantum of compensation, the court has considered the following;
1. The Claimant was an employee of the Respondent for a duration of about 3 years 10 months which is not too long.
  2. The Claimant had no recorded warning or misconduct before November 2017.
  3. The Claimant did not appeal the Respondent's decision nor indicate that he wished to remain in the employment of the Respondent.
  4. The Claimant substantially contributed to the termination of his employment.
111. In the circumstances, the court is satisfied that the equivalent of 3 months gross salary is fair, Kshs.76,140/=.
112. In the upshot, judgement is entered in favour of the Claimant against the Respondent as follows;
- a. Declaration that termination of the Claimant's employment by the Respondent was unfair.
  - b. One month's salary in lieu of notice Kshs.25,380/=.
  - c. Equivalent of 3 months gross salary Kshs.76,140/=.
- Total Kshs.101,520.00/=
- d. Costs of this suit.
  - e. Interest at court rates from date of judgement till payment in full.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9TH DAY OF NOVEMBER 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 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 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 {>/akn/ke/act/1924/3 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  
DRAFT**

