



**Musitia v Associated Construction Co Ltd (Employment and Labour Relations Cause E455 of 2021) [2023] KEELRC 3156 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3156 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E455 OF 2021**

**K OCHARO, J**

**NOVEMBER 9, 2023**

**BETWEEN**

**PETER MUKABWA MUSITIA ..... CLAIMANT**

**AND**

**ASSOCIATED CONSTRUCTION CO LTD ..... RESPONDENT**

**JUDGMENT**

1. Through a Memorandum of Claim dated the 1<sup>st</sup> December 2020, the Claimant instituted a Claim against the Respondent seeking the following reliefs;
  - a. The declaration that the termination of the Claimant's employment by the Respondent was unlawful, malicious, un-procedural and an infringement on his Constitutional rights.
  - b. Maximum compensation for the wrongful termination.
  - c. One month notice in lieu of notice.....Ksh. 98,900.
  - d. Damages for wrongful dismissal..... Ksh. 1,186,800.
  - e. Annual leave not granted ..... Ksh. 258,000.
  - f. Service Gratuity..... .Ksh. 342,348.15.
  - g. House allowance..... Ksh. 528,900.
  - h. Interest on the total.
  - i. Certificate of service.
  - j. Costs of the cause.
  - k. Any other reliefs the Court may deem fit to grant.



2. The Statement of Claim was filed contemporaneously with the Claimant's Witness Statement dated 1<sup>st</sup> December 2020 and a list of documents of the even date.
3. Upon being served with the summons to enter appearance, the Respondents did not file a Memorandum of Appearance nor file a Response to the Claim, consequently, on 14<sup>th</sup> November 2022 the Court directed that the matter proceed as an undefended cause.
4. At the formal proof hearing on 9<sup>th</sup> May 2023, the Claimant urged the Court to adopt his Witness Statement as well as the filed documents as his documentary evidence in support of his case. The Court so adopted.

### **The Claimant's case**

5. It was the Claimant's case that on the 16<sup>th</sup> March, 2013, he was employed by the Respondent as a Workshop Manager where he worked diligently up until the time he was dismissed. The Claimant further contended that he was not afforded leave during his employment nor was he compensated for the same.
6. The Claimant contended that he was not issued with an employment contract despite the fact that he had worked for the Respondent for more than 8 years. The Claimant further averred that at the time of dismissal, he was drawing a monthly salary of Ksh. 86,000, however, he was not issued with payslips throughout the time he was engaged by the Respondent. Furthermore, he was not afforded a house allowance.
7. It is The Claimant's Case that on the 16<sup>th</sup> of August 2019, he was summarily dismissed on allegations that he was extorting money from his fellow employees and that he had negligently handled a Plant. Further, without being given a chance to present his Case nor issued with the evidence that was used by the Respondent to reach the decision to dismiss him from employment.
8. The Claimant asserted that he didn't at any time extort money from his colleagues, negligently handle the plant or steal his employer's property.

### **The Claimant's Submissions**

9. The Claimant filed his submissions on the 23<sup>rd</sup> of June 2023 distilling three issues for determination thus:
  - i. Whether the termination was fair on merit and procedure.
  - ii. Whether the Claimant is entitled to the reliefs sought.
  - iii. Who should bear the costs?
10. The Claimant's Counsel submitted that the Claimant was accused of soliciting and receiving a bribe an allegation which was not true. It was the duty upon the Respondent to prove the reason for the dismissal of the Claimant and that the same was valid and fair. This duty could only be discharged by them placing before this Court evidence that there was a genuine complaint that he had been involved in the alleged infraction. The Respondent didn't place forth any evidence, consequently, it did not discharge the legal burden contemplated under sections 43 and 45[2] of the [Employment Act](#). Therefore, the termination was unfair.



11. To buttress the above submissions reliance was placed on the case of Walter Anuro Ogal v Teachers Services Commission [2013] eKLR where it was held:

“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.”

12. The Claimant also relied on the case of Naima Khamis v Oxford University Press [EA] Limited [2017] eKLR where the Court held:

“On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also, Section 45(2) (c) requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.”

13. The Claimant further relied on the case of James Ondima Kabesa v Trojan International Limited [2017] eKLR in fortifying his submissions. Lastly, the Claimant submitted that he is entitled to all the reliefs sought.

#### **Analysis and Determination.**

14. From the pleadings, the evidence on the record as well as the submissions by the Counsel for the Claimant, the following issues present themselves for determination:

- i. Whether the termination of the Claimant’s employment was fair.
- ii. Whether the Claimant is entitled to the reliefs sought.
- iii. Who should shoulder the costs of the suit?

#### **Whether the termination of the Claimant’s employment was fair.**

15. The *Employment Act* 2007 puts forth two aspects that must be considered by the Court whenever called upon to interrogate fairness of an employee’s dismissal or his/her termination from employment. The aspects are procedural fairness and substantive justification.

16. Section 41 of the *Employment Act* provides the structure for procedural fairness. It provides;

“Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of



misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1)”

17. Procedural fairness entails three components based on the provisions of section 41 of the *Employment Act*. First the information or the notification component. The employer has to inform the employee against whom he or she intends to act, of the intention and the grounds prompting the intention. The second is the hearing component, the employer has to accord the employee an opportunity to make representations on the grounds. Conjoined with this is the employee’s right of accompaniment. The employer shall allow the employee to be accompanied by a colleague or a union representative [if he or she is a member of a union], during the hearing. Lastly, the employer has to consider the representations by the employee or accompanying person before deciding on the accusation[s].
18. The provision is couched in a mandatory manner; any form of non-adherence to it, legally renders the termination or the summary dismissal unfair pursuant to the provisions of section 45 of the *Act*.
19. By dint of the provisions of section 45 [2], the duty to prove that there was procedural fairness in the termination or summary dismissal lies on the employer. The Respondent neither entered appearance nor filed any response to the Claimant’s Claim. Further, it didn’t tender any evidence to establish the presence of procedural fairness in the Claimant’s summary dismissal. Therefore, the Respondent didn’t discharge its burden under section 45 [2].
20. Looking at the materials placed before this Court, one cannot find any difficulty in being persuaded by the evidence of the Claimant that the Respondent did not follow the basic prescript of the *Employment Act* regarding procedural fairness.
21. By reason of the foregoing premises, I find that the summary dismissal was procedurally unfair.
22. Section 43 of the *Act* requires an employer in a dispute like the instant one, to prove the reason[s] for the termination, otherwise the termination will be deemed unfair by dint of the provisions of section 45. It is imperative to state however that it is not enough for the employer to prove the reason[s] but must further demonstrate that the reason[s] was fair and valid as required by the provision of section 45 (2) of the *Employment Act*.
23. The main grounds for the Claimant’s summary dismissal were misconduct and failure to look after a Plant. The termination letter reads in part:

“Re: summary Dismissal for Misconduct and Failure to look after your Plant

We received complaints from 6 workers in writing that you have been demanding money from them to be in employment.

When we asked you, you denied but the six workers were called in front of you, and they said it was true you received money from them. Later you accepted and apologized, stating that you will not repeat the said mistake.

Secondly, the Hamm Flat roller KAX 236 P fly wheel got damaged due to loss of fuel in the tank. On 15<sup>th</sup> August 2019, we drained diesel from the machine and only 40 litres was recovered, which had been issued on Tuesday 13<sup>th</sup> August 2019 yet the machine failed to work. This means that all the previous diesel in the machine was siphoned including its reserve, by Saturday 10<sup>th</sup> August 2019 morning, when the machine broke down.

Both actions of getting money from the workers and the failure to look after the plant which is your responsibility are liable to summary dismissal.”



24. There is no doubt that the Claimant's employment came to an end through summary dismissal. According to section 44 [3] of the Employment Act, an employer may summarily dismiss an employee when the employee has by his conduct indicated that he had fundamentally breached his obligations arising under the contract of service.
25. A legal burden is ordinarily discharged by adduction of evidence. In this matter, the Respondent neither filed any pleadings nor adduced any evidence to justify the dismissal of the Claimant by demonstrating the reasons for the termination and that the reason was fair and valid. I conclude that in view of this, the summary dismissal of the Claimant from employment was substantively unjustified.
26. The upshot, it is my conclusion that the Claimant's dismissal from employment was both procedurally and substantively unjustified.

### **Whether the Claimant is entitled to the reliefs sought or any of the reliefs.**

#### **i. One month salary in lieu of notice**

27. Having noted as I have hereinabove that the Claimant's summary dismissal was both procedurally and substantively unfair and the fact that he was not served with a month's notice termination notice or paid in lieu of notice, as contemplated under the provisions of sections 35 and 36 of the Employment Act, I hereby award the Claimant Ksh. 86,000 as salary in lieu of notice.

#### **ii. 12 months' compensation for the unfair termination**

28. The Claimant sought compensation for the unfair termination to the tune of Kshs.1, 186,800. This Court is aware of the fact that 12 months' gross wages or salary is the maximum awardable compensation provided for under section 49 (1) (c) of the Employment Act 2007. Granting the relief is discretionary. Whether maximum compensation is awardable or a portion or no compensation depends on the circumstances of each case. Having noted as I have hereinabove that the summary dismissal was unfair, that the conduct of the Respondents was without any rationale, and the length of period the Claimant was engaged at the Respondent's, I am inclined to award the Claimant the compensatory relief to an extent of 6 (six) months' gross salary, Ksh.516, 000.

#### **iii. Annual Leave not granted**

29. Section 28 of the Employment Act 2007 enjoins the employer to allow the employee to proceed for annual leave and where the leave days earned aren't utilised payment in lieu should be made by the employer. The Claimant's evidence that he never utilised his earned leave days or compensated for the same, was not rebutted. The claimant is hereby awarded compensation for the earned but untaken leaves as tabulated hereunder.

$$[86,000 \times 3 \times 21/30] = \text{Ksh. } 108,600.$$

#### **iv. Service Pay**

30. Section 35(5) of the Employment Act provides for service pay. However, subsection 6 exempts particular categories of employees from the benefit of service pay, and therefore claiming to be entitled to the same. There is no evidence placed before me from which it can be discerned that the Claimant fell under any of the categories contemplated under subsection 6. The Claimant is hereby awarded service gratuity as tabulated hereunder:

$$\text{QUOTE } [86,000/30 \times 15 \times 6 \text{ years}] = \text{Ksh. } 258,000$$



## v. House Allowance

31. Payment of a house allowance is a statutory requirement and one that is couched in mandatory terms. Employers are bound by Section 31(1) of the Employment Act, 2007, to either provide an employee reasonable housing accommodation or pay the employee sufficient housing allowance as rent in addition to the basic salary. The Claimant contended and it was not rebutted that he was neither accommodated by the Respondent nor that his salary was a consolidated salary as contemplated under section 31[2] of the Act. His claim for unpaid house allowance succeeds. He is hereby awarded  $[15\%/100 \times 86,000] = \text{Ksh. } 12,900 \times 41 \text{ months} = \text{Ksh. } 528,900$ .
32. The Respondent is hereby directed to issue the Claimant with a Certificate of Service pursuant to section 51 of the Employment Act 2007

## Who bears the cost of the suit?

33. The cost of the suit to be borne by the Respondent.
34. The upshot, judgment is hereby entered for the Claimant against the Respondent in the following terms:
- a. A declaration that the dismissal of the Claimant from employment was procedurally and substantively unfair.
  - b. One month's salary in lieu of notice..... Ksh. 86,000.
  - c. 6 months' gross salary compensation pursuant to section 49 [1] [c] of the Employment Act 2007.....Ksh. 516,000.
  - d. Compensation for leave days earned but not paid for ..... Ksh. 108,600.
  - e. Service pay ..... Ksh. 258,000.
  - f. Unpaid house Allowance..... Ksh. 528,900.
  - g. Certificate of service pursuant to section 51 of the Employment Act}} 2007.
  - h. Cost of the suit & interest.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>th</sup> DAY OF NOVEMBER, 2023.**

**OCHARO KEBIRA**

**JUDGE**

In the presence of:

Ms Nanjendo for Claimant

No appearance for Respondent

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 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.

A signed copy will be availed to each party upon payment of court fees.

**OCHARO KEBIRA**

**JUDGE**

