



REPUBLIC OF KENYA



KENYA LAW
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Kimanzi v Nairobi City County Assembly Service Board & another (Cause E031 of 2022) [2023] KEELRC 3219 (KLR) (7 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3219 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E031 OF 2022
B ONGAYA, J
DECEMBER 7, 2023

BETWEEN

NICHOLAS DAVID KIMANZI CLAIMANT

AND

NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD 1ST RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY 2ND RESPONDENT

JUDGMENT

1. The claimant filed the statement of claim on 21.01.2022 through Mbatie Associates & Company Advocates. The claimant prayed for judgment against the respondent for:
 - a. A declaration that the termination of the contract between the claimant and the respondent was and remains unfair, wrongful and unlawful hence void.
 - b. 1-month salary in lieu of notice Kshs.76,970/=
 - c. Leave days not taken $\text{Kshs.}2,565.67 \times 21 \text{ days} = 53,879.00/=$
 - d. 12 months' salary as compensation for unfair termination $\text{Kshs.}6,970 \times 12 \text{ months} = \text{Kshs.}923,640/=$
 - e. Gratuity at the rate of 31% for a period of one-year $31/100 \times (\text{Kshs.}76,970 \times 12) = \text{Kshs.}286,328.4/=$
 - f. Damages for unfair termination.
 - g. Costs of the cause.
 - h. Interest on (b), (c), (d), (e) and (f)
 - i. Any other or further relief that the court may deem fit to grant.



2. The 1st and 2nd Respondent's Amended Statement of Defence dated 03.03.2023 was filed through Nyareru & Associates Advocates. The respondent prayed that the suit be dismissed with costs.
3. The claimant's case was that he was an employee of the 1st respondent employed on 01.09.2020 as a personal assistant (administrative officer) to the office of the majority chief whip.
4. That he earned a gross salary of Kshs.76,970/=. The claimant stated that at all material times he exhibited exemplary performance in the execution of his duties and devoted himself to the success of the 1st respondent.
5. On 01.09.2021 the claimant states he was blocked from entering his work station by the sergeant at arms Nairobi City County Assembly. Upon enquiring, he was informed that the Clerk of the Assembly had issued firm instructions that he should not be allowed to access the office and was asked to surrender his set of keys.
6. It is the claimant's case that he was served with neither a show cause letter nor a termination of employment letter, and, that the reasons for his termination were not communicated to him.
7. The claimant maintains that he is entitled to procedural fairness and that his termination of employment was unlawful and unfair contrary to the doctrine of natural justice.
8. On the part of the respondents, it is stated that the claimant was hired as a personal assistant to the office of the Majority Party Chief Whip with effect from 01.09.2020, and, that he worked for the respondents until 01.09.2021 when his employment was terminated.
9. The termination of the claimant was based on the ground that he was persistently away from duty without leave from office nor reasonable cause. That the claimant severally failed to follow lawful instructions, refused to perform his duties and was generally belligerent and negligent. Additionally, the claimant reported to work intoxicated on various occasions and the respondent had to send him home.
10. The respondents maintain that the claimant's contract of employment was terminated lawfully due to gross misconduct and he was issued with termination of employment letters dated 12.08.2021 and 20.09.2021.
11. The parties filed their respective submissions. The Court has considered the parties' respective cases and makes finding as follows.
12. To answer the 1st issue there is no dispute that parties were in a contract of service.
13. The 2nd issue is whether the claimant was terminated. His account is that he was locked on 01.09.2021. the respondent has exhibited a letter by the Majority Chief Whip dated 12.08.2021 addressed to the Clerk of the Assembly requesting that the claimant is terminated effective 01.09.2021 on account of absenteeism from duty, insubordination, intoxication while on duty or working hours. The Clerk then addressed to the claimant the letter dated 20.09.2021 conveying termination of appointment upon the stated grounds effective 01.09.2021. by letter dated 25.09.2020, the claimant had been employed as Personal Assistant to the Majority Chief Whip effective 01.09.2020. Thus, for both parties, termination was effective 01.09.2021. The claimant confirmed he had been appointed as Personal Assistant to the Majority Chief Whip.
14. To answer the 3rd issue, the Court finds that the claimant was not accorded due process of a notice and a hearing per section 41 of the *Employment Act*, 2007. It was unfair procedurally. To that extent, it cannot be said that as at termination, the respondent has shown that there were valid reasons per



section 43. While the Majority Chief Whip reported to the clerk about the claimant's misconducts, the Clerk proceeded to issue a termination letter without testing the veracity of the reported and alleged misconduct. The claimant was a public officer and he was entitled to all the safeguards of due process per the applicable laws and regulations or policies governing public service. It was misconceived to be submitted for the respondents that the claimant served at the pleasure of the Majority Chief Whip. No legal provision was invoked to establish such strange submission. As submitted for the claimant, under section 47(5) of the *Employment Act* the respondent's burden was to justify the reasons for termination. The burden has not been established.

15. The 4th issue is on remedies. The Court has considered the factors in section 49 for grant of compensation. The claimant had served for a year. He may or may not have contributed to his termination. It is that the respondent failed to verify the allegation. He is awarded 2-months compensation and a month's pay in lieu of notice being Kshs,76,970.00 x 3 =Kshs.230,910.00 less PAYE. Per contract gratuity is awarded Kshs.286, 328.40 as prayed for. There are no violations of rights or fundamental freedoms shown beyond the contractual relations and awarded reliefs.
16. In conclusion judgment is hereby entered for the claimant against the respondent for:
 1. The declaration the termination of the contract of service was unfair, wrongful and unlawful.
 2. The respondent to pay the claimant the sum of Kshs.517,238.40 less PAYE by 01.02.2024 failing interest to be payable thereon at court rates from today till full payment.
 3. The respondent to deliver a certificate of service per section 51 of the *employment Act*.
 4. The respondent to pay costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 7TH DECEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

