



**Okoth v Darad Shopping Centre Ltd (Cause 278 of 2015)
[2023] KEELRC 3237 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3237 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 278 OF 2015
AK NZEI, J
DECEMBER 7, 2023**

BETWEEN

CAROLYNE AKINYI OKOTH CLAIMANT

AND

DARAD SHOPPING CENTRE LTD RESPONDENT

JUDGMENT

1. The suit herein was instituted by the Claimant on 30/4/2015 vide a statement of claim dated 29/4/2015. The Claimant pleaded that she was employed by the Respondent as a manager with effect from 1/5/2004, earning a salary of ksh. 30,000 by 1/1/2013, and that during the period of her employment, she never received any warning letter, and was never disciplined for any dereliction of duty.
2. The Claimant further pleaded that on 19/4/2014, the Respondent, through its director, terminated the Claimant’s employment without any justifiable reason, and without granting an opportunity to the Claimant to defend herself against any allegation, if any. That the Respondent’s refusal to pay the Claimant’s salary and terminal dues caused the Claimant undue stress and inconvenience.
3. It was the Claimant’s further pleading that termination of her employment was unlawful and violated provisions of the Employment Act and the Constitution of Kenya 2010.
4. The Claimant set out her claim against the Respondent as follows:-
 - a. Notice pay.....ksh. 30,000
 - b. April salary.....ksh. 30,000
 - c. Severance pay.....ksh. 242,307
 - d. Unpaid leave days (10years).....ksh. 30,000



- e. Costs of the suit.
5. The Respondent entered appearance on 2/6/2015 and filed a memorandum of defence and Counter-Claim on 26/6/2015. The Respondent pleaded that the Claimant's suit was statute-barred, that the Claimant deserted work in 2014 and refused to meet other company employees and Auditors, and that the Claimant took her leave days during the 10 years of her employment. That on 20/12/2014, a fire destroyed the Respondent's premises and records, hence the reason why the Claimant brought the suit herein.
 6. By way of a Counter-Claim, the Respondent pleaded that during her ten years' service, the Claimant refused/neglected to pay rent, pay for electricity and water for the on the Respondent's premises she occupied, at the rate of ksh. 15,000 per month. The Respondent claimed ksh. 1,800,000 (15,000 per month for 10 years). The Respondent further claimed ksh. 30,000 from the Claimant, being one month salary in lieu of notice, costs of the suit and interest.
 7. The Claimant filed reply to defence and defence to Counter-Claim on 26/6/2015. The Claimant denied the Respondent's Counter-Claim and further pleaded that the same was frivolous, scandalous in nature, and had no place in this Court.
 8. The Claimant filed an amended statement of claim on 12/4/2018 and amended her claim against the Respondent to read as follows:-
 - a. Maximum compensation for wrongful dismissal and unfair termination.....ksh. 360,000
 - b. Notice pay.....ksh. 30,000
 - c. April salary.....ksh. 30,000
 - d. Unpaid leave days.....ksh. 72,692
 - e. Costs of the suit and interest.
 9. The Respondent does not appear to have amended its memorandum of defence and counter-claim, as I have not seen an amended version of the said document on record.
 10. Other documents filed by the Claimant herein were an affidavit in verification of her claim, the Claimant's witness statement dated 15/4/2015 and a list of documents dated 29/4/2015, listing eight documents. The listed documents included a letter by the Respondent to the Claimant dated 8/4/2014, the Claimant's letter to the Respondent dated 9/4/2014, a termination letter dated 19/4/2014, a confirmation of hand-over dated 17/4/2014, letters from the Labour Office dated 25/11/2014 and 20/1/2015 respectively, a demand letter dated 23/3/2015 and reply to the demand letter dated 13/4/2015.
 11. The Respondent, on the other hand, filed a written witness statement of Luciano Magnesi (filed in Court on 8/7/2015) and a list of documents dated 7/7/2015, listing five documents. The listed documents included the Respondent's letter to the Claimant dated 8/4/2014, the Respondent's response to the Claimant's letter (dated 13/4/2015), termination of employment letter dated 19/4/2014, a Muster Roll and a letter from the labour office dated 25/11/2014.
 12. Trial opened before me on 7/6/2022 when the Claimant testified and adopted her filed witness statement, which replicates the averments made in the statement of claim as her testimony, and produced in evidence the documents referred to in paragraph 10 of this judgment. The Claimant



- further testified that she worked as a manager, taking care of all the Respondent's properties at the time, and earning a gross monthly salary of ksh. 30,000.
13. It was the Claimant's further evidence that she started working for the Respondent in 2004, and that the Respondent gave her a termination letter when she went back to work after Easter Holidays (in 2014), without notice or disciplinary proceedings. That the termination letter stated that her services were no longer needed.
 14. It was the Claimant's further testimony:-
 - a. that her salary was paid in cash, and that there was no pay statement on the salary payment.
 - b. that the Claimant did not take leave during the entire period of employment, as she was the only person managing the Respondent's properties, and that she was not paid in lieu of leave for the ten (10) years that she worked.
 - c. that her employment was terminated in April 2014, that she was not paid her salary for that month; and that she was not issued with a certificate of service.
 15. Cross-examined, the Claimant testified that her last day of work was 19/4/2014, the date on which she received the termination letter. It was the Claimant's further testimony:-
 - a. that she did not desert duty, but was terminated.
 - b. that she lived in a house owned by the Respondent company and that she did not pay rent. That the house was a benefit.
 16. The Respondent called one witness, Luciano Magnesi (RW-1), who adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 11 of this judgment. Cross-examined, RW-1 admitted, that the Respondent's letter dated 8/4/2014 indicated that the Claimant had applied for leave but RW-1 refused. That in the termination letter dated 19/4/2014, the Respondent directed the Claimant to hand over.
 17. RW-1 further admitted in evidence that no show cause letter had been issued to the Claimant, and that she was not invited to a disciplinary hearing. That the Respondent never responded to the letters from the Labour Office, never indicated that the Claimant had deserted work; and that there were no documents indicating that the Claimant had taken leave.
 18. The Respondent (RW-1) testified that the muster roll produced by the Respondent in evidence showed that no house allowance was paid to the Claimant. That the Claimant was not paid house allowance as she was living in a company accommodation/house. That the Respondent company never demanded/required the Claimant to pay rent or for water and electricity.
 19. Having considered the pleadings filed and evidence presented by the parties herein, issues that present for determination, in my view, are:-
 - a. whether the Respondent terminated the Claimant's employment.
 - b. whether termination of the Claimant's employment was unfair.
 - c. whether the Claimant is entitled to the reliefs sought.
 20. On the first issue, the Claimant pleaded and testified that the Respondent's Director terminated her employment. She produced in evidence a copy of her termination letter dated 19/4/2014 and signed



by Mr. Luciano Magnesi, the Respondent's director. The said letter, addressed to the Claimant, reads as follows, in part:-

“Re: Termination of Employment

Due to your persistent refusal to cooperate and work diligently, you are hereby served with a formal termination of your service with Darad Shopping Centre Limited.

Kindly arrange to hand over your duties to your new replacement by the 1st of May 2014. Also arrange to handover any company property in your possession to the relevant person or the company director...”

21. RW-1 the Respondent's director, testified that the Claimant was terminated, and was directed to hand over. Without belabouring the point, I find and hold that the Claimant's employment was terminated by the Respondent.
22. On the second issue, it was a common ground that the Claimant was employed by the Respondent in the year 2004 and worked until 19/4/2014 when her employment was terminated by the Respondent vide a termination letter dated 19/4/2014. It was further a common ground that the Claimant was not issued with any show cause letter, and was not subjected to any disciplinary hearing or invited to any such hearing. She was, therefore, not given an opportunity to be heard before termination.
23. Section 41 of the [Employment Act](#) sets out a mandatory procedure that must be adhered to by any employer contemplating termination of an employee's employment. The Section provides as follows:-
 - “(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on 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, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”
24. The foregoing statutory provision is couched in mandatory terms and must, therefore, be adhered to by any employer contemplating termination of an employee's employment on grounds of misconduct, poor performance or physical incapacity. In the termination letter, the Respondent stated that the Claimant had refused to cooperate and to work diligently. This general allegation had earlier on been echoed in the Respondent's earlier letter to the Claimant dated 8/4/2014. In my view, this allegation falls within the purview of an allegation of poor performance. The Respondent was, therefore, obligated to comply with Section 41 in terminating the Claimant's employment, but did not. Further, the Respondent did not demonstrate that it had a valid reason for terminating the Claimant's employment. Section 45(2) (a) of the [Employment Act](#) provides that termination of an employee's employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid.



25. It was held as follows in [Walter Ogal Anuro v Teachers Service Commission](#) [2015] eKLR:-
- “...For a termination of employment to pass the fairness test, there must be both substantive justification and 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 in effecting the termination.”
26. It is worthy noting that the Claimant was also not shown to have been given a termination notice pursuant to Section 35(1) (c) of the [Employment Act](#); and was not shown to have been paid in lieu of notice.
27. The Court of Appeal held as follows in [Kenfreight \[E.a\] Limited V Benson K. Nguti](#) [2016] eKLR:-
- “ Apart from issuing a proper notice according to the contract (or payment in lieu of notice provided), an employer is duty bound to explain to an employee, in the presence of another employee or 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....We come to the conclusion and find, in agreement with the trial Judge, that the termination of the Respondent’s contract of service, in the circumstances, was unfair, the payment in lieu of notice notwithstanding...”
28. It is my finding that termination of the Claimant’s employment by the Respondent was substantially and procedurally unfair.
29. On the third issue, it was a common ground that the Claimant was earning a monthly salary of ksh. 30,000. I award her an equivalent of nine months’ salary being compensation for unfair termination of employment. That is ksh. 30,000X9 = ksh. 270,000.
30. The Claimant is also awarded ksh. 30,000 being one month salary in lieu of notice pursuant to Section 35(1) (c) of the [Employment Act](#). Regarding the claim for April 2014 salary, both parties demonstrated that the Claimant’s employment was terminated on 19/4/2014. The Claimant pleaded and testified that she was not paid for the month of April 2014. The Respondent did not rebut and/or challenge that evidence, and did not demonstrate that the Claimant was paid for the month of April 2014 or any part thereof. I award the Claimant ksh. 19,000 being salary for the 19 days worked in April 2014.
31. The Claimant pleaded and testified that she never took (annual) leave during the ten years that she worked for the Respondent, as she was the only person taking care of the Respondent’s properties. The Respondent did not rebut that evidence, and did not produce in evidence any records to show that the Claimant had taken any annual leave during her ten years of service. Section 74(f) of the [Employment Act](#) obligates an employer to keep records on each employee’s leave entitlement, days taken and days due.
32. It is not clear why the Claimant claimed only ksh. 72,692 for unpaid leave in her amended statement of claim, despite having served for ten years without taking leave. Parties are always bound by their pleadings. I award the Claimant the ksh. 72,692 as prayed.
33. The Respondent’s Counter-Claim for ksh. 1,800,000 against the Claimant was not proved. The Respondents claim for ksh. 30,000 being one month salary in lieu of notice cannot stand as the Claimant’s employment was terminated by the Respondent. Further, the Respondent’s claim for ksh. 15,000 per month being rent and payment for electricity and water during the Claimant’s ten



years of service cannot stand, as well, as the Claimant was entitled to housing accommodation by the Respondent or to payment of house allowance during the period of employment pursuant to Section 31 of the Employment Act 2007.

34. The Claimant's monthly salary of ksh. 30,000 was not shown by the Respondent to have included house allowance. The Respondent admitted in evidence that the Claimant was not paid house allowance. Further, a claim for alleged unpaid rents would ordinarily fall under a different regime of the law, unless a contract of employment specifically states that an employee, to whom house allowance is paid, but is accommodated by the employer, would pay for the accommodation provided.
35. The counter-claim is devoid of merit, and is dismissed.
36. In sum, and having considered written submissions filed by Counsel for both parties herein, judgment is hereby entered for the Claimant against the Respondent as follows:-
- a. Compensation for unfair termination of Employment.....ksh. 270,000
 - b. Payment in lieu of notice.....ksh. 30,000
 - c. Salary for (days worked in) April 2014.....ksh. 19,000
 - d. Unpaid leave.....ksh. 72,692
- Total = ksh. 391,692
37. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
38. The Claimant is awarded costs of both the suit and the Counter-Claim, and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DECEMBER 2023.

AGNES KITIKU NZEI

JUDGE

ORDER

This judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable

