



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 765 OF 2017**

*(Before Hon. Justice Ocharo Kebira)*

**ALEX PETER MWANGI MAINA.....CLAIMANT**

**VERSUS**

**JIMLIZER HOTEL LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant through a statement of claim herein dated 12<sup>th</sup> April 2017, impleaded the respondent seeking for the reliefs and orders that were put forth therein thus:

- a) A declaration that the respondent's termination/dismissal of the claimant's employment was illegal, unlawful, unfair and inhumane; and that the claimant is entitled to his due terminal benefits and damages.
- b) An order that the respondent do pay the claimant his terminal dues and compensatory damages totaling to Kshs. 342,700.00.
- c) General damages for the injuries sustained.
- d) An order for the respondent to pay the claimant, costs of this claim plus interest thereon.

2. Upon being served with summons to enter appearance, the respondent did not. Consequently, and subsequently the matter was certified to proceed as an undefended cause. The cause proceeded for formal proof on the 1<sup>st</sup> December 2021.

3. The claimant appeared before court, making a brief oral testimony. He urged the court to adopt the contents of his witness statement dated 24<sup>th</sup> April 2017 as his evidence in chief and the documents that were filed under a list of exhibits of the even date as his documentary evidence. The court so admitted them.

4. It was the claimant's case that he came into the employment of the respondent on the 3<sup>rd</sup> September 2016, as a waiter, with a starting salary of Kshs. 13,000 per a month.

5. He stated that he served the respondent with dedication, and to its satisfaction. His good work earned him a promotion and a salary increment. He rose to the rank of captain with a consequential salary of Kshs. 23,00 per a month.

6. The claimant stated that on or about the 27<sup>th</sup> February 2017, he reported to work as usual, when he was summoned to report to the Director's office where he found the Director, Mr. Gachiri, and Mr. George Ngige the General manager.

7. He further stated that to his surprise, a termination letter was handed over to him; the two demanded that he signs for it. That he did not accede to the demand, insisting to do it only upon being paid his terminal dues. At that juncture the General manager closed the door and started assaulting him. The Director joined the assault. The claimant had to escape through the window.

8. After the escape, he realized that he was bleeding from the leg. He went to Buru Buru Health Centre for treatment. It was discovered that he had a fractures on the leg that the Director had stepped on.

9. The claimant further stated that he reported the matter to Buru Buru Police Station under O.B. Number 65/01/03/017. He was issued with

a P3 form, following the report.

10. He tendered the following documents in evidence.

- a) A demand letter dated 3<sup>rd</sup> March 2017.
- b) Instructions note dated 3<sup>rd</sup> March 2017.
- c) Medical letter from Buru Buru Health Centre dated 27<sup>th</sup> February 2017.
- d) Copy of the P3 form dated 2<sup>nd</sup> March 2017.
- e) His national identity card – copy.

11. He asserted that he was not given any reasons for the termination. The respondent had no justified reason for the decision to terminate his employment. The termination was without due procedure.

12. The following issues emerge as the issues for determination in this matter:

- a) Whether the termination of the claimant's employment was fair.
- b) What reliefs if any is the claimant entitled to?
- c) Who should bear the costs of this matter?

**Whether the termination of the claimant's employment was fair.**

13. The total sum unit for fairness in termination of an employee's employment or summary dismissal is a combination of both procedural and substantive fairness. Absence of any of the two renders the termination or summary dismissal unfair.

14. Section 45 of the Employment Act commands that no employer shall terminate the employment of an employee unfairly. Section 45 (2) (c) gives the reason why an employer contemplating terminating an employee's employment or summarily dismissing him or her must engage a fair process, a default in engaging such a process will render the termination or summary dismissal unfair. The employee shall be put in the part of entitlement to one or more of these remedies provided for under section 49 of the Act, as a consequence.

Section 41 of the Employment Act provides for fair procedure:

*“(1) subject to section 42 (1), an employer shall, before terminating the employment of an employee, on grounds of misconduct, poor performance or incompatibility or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is preferring 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 representation which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”*

15. On fair procedure, this Court in the case of **Daniel Ochieku Achori -vs- Dynaplast Limited, ELRC No. 533 of 2016**, stated:

*“20. It is clear therefore that once an employer conceives an intention of terminating an employee's employment or summarily dismissing him or her, an employer shall:*

- a) Clearly indicate his intention to the employee, and the reason forming basis of the intention, and the intended action.*
- b) Express to the employee that he has a right to be accompanied by a colleague (where the employee is not a member of a union) or a shop steward (where the employee is a member of a union), and allow it to happen, when the employer shall be explaining the grounds to the employee and receiving representations on the grounds from the employee.*
- c) Accord the employee and, or his colleague an opportunity to make representations on those grounds.*
- d) Make a reasoned determination, which must take into account the representations by the employee and, or his colleague.”*

16. The respondent was under an obligation to prove that the mandatory statutory procedure encapsulated under section 41 of the Act was adhered to. The respondent did not file a response to the claim. It did not present any evidence to counter the claimant's allegations. It cannot be said therefore that it discharged the burden.

17. By reason of a foregoing premise it is not difficult to conclude that the termination was procedurally unfair.

18. Section 43 of the Employment Act places upon the employer the burden of proof of the reason for termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45 of the Act.

19. Section 45 of the employment Act provides that termination of an employment by an employer can only be said to be fair if the employer proves that the reason for the termination was fair and valid, related to the employee's conduct, capacity or compatibility or based on the operational requirements of the employer.

20. The respondent did not place any evidence before this court to help it ascertain what the reasons for the termination were and whether they would be termed fair and valid. In absence of this, the claimant's evidence that the termination was without a valid reason stands uncontroverted.

21. In the upshot, the court concludes that the termination of the claimant's employment by the respondent was substantively unfair.

#### **Of the reliefs**

22. The claimant claims *inter alia* for a one month's salary in lieu of notice. He contended that he was terminated without notice, as a basis for the claim. Under section 35 of the Employment Act, the claimant's employment would be terminated with a notice. Its character as deduced from the material before this court places the same under the ambit of those contemplated under the said section. I am prepared to agree with the claimant that he is entitled to a one month's pay in lieu of notice, Kshs. 23,000.

23. The claimant contended that his employment was terminated on the 27<sup>th</sup> February 2017. That he was not paid for that month. It was the employer's (respondent's) duty to demonstrate to court that contrary to the claimant's assertion, the salary was paid. In absence of such from the respondent, I am left to conclude that the salary was not paid. The claimant is entitled to be awarded the same, Kshs. 23,000.

24. The claimant has sought for an award of Kshs. 20,700 house allowance. Neither the pleadings nor the evidence by the claimant, sets a foundation upon which this figure or any other can be granted. The claim and the figure are "just thrown to court." It will not be the business of the court to speculate. I decline to make the award.

25. A compensatory relief for the unfair termination has been sought. Section 49 (1) (c) of the Employment Act bestows upon this court the authority to grant the relief. Imperative to state that the grant is discretionary, its extent will always depend on the circumstances of each case. I have considered the manner in which the termination occurred, including the fact that the claimant was assaulted when he demanded for his dues, and that the employer decided with no justification to withhold his salary for February 2017 and find that he merits the award, which I find at 10 (ten) months' gross salary, Kshs. 230,000.

26. The claimant further sought for general damages for the injuries he sustained as a result of the assault. I have agonized over this claim, as much as I discern and conclude that the claimant suffered the injuries and therefore would be entitled to compensation, I am persuaded that liability can attach against the respondent. He ought to have sued the people who assaulted him for compensation. This is the tragedy of poor draftsmanship.

27. Had he sued the two for compensation for the injuries I would have awarded him Kshs. 180,000 as general damages.

28. In the upshot, I hereby enter Judgment in favour of the claimant in the following terms:

**a) A declaration that the termination was procedurally and substantively unfair.**

**b) Unpaid salary for the month of February 2017, Kshs. 23,000.**

**c) Compensation pursuant to section 49 (1) (c) of the Employment Act, Kshs. 230,000.**

**d) One month's salary in lieu of notice, Kshs. 23,000.**

**e) Interest on (b) (c) & (d) above at court rates from the date of filing this suit till full payment.**

**f) Costs of the cause.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF JANUARY, 2022.**

**OCHARO KEBIRA**

**JUDGE**

In Presence of:

Ms Mayori for the Claimant.

## **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**