



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NUMBER 957 OF 2017

CHARLES MUTHUSI MUTUA.....CLAIMANT

VERSUS

KATHI NO KAKOKA SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant has sued the Respondent herein alleging that at all material times he was an employee of the Respondent, whose employment was terminated by the latter unfairly and unlawfully, and therefore entitling him to the expansive remedies provided for under the law. The Respondent on the other hand denied that Claimant was its employee at any time, and therefore cannot assert that he was terminated from an employment that were never, and allege entitlement to any of those reliefs he has sought. Whether the Claimant was an employee of the Respondent at the material time or at all, is the principal issue for determination therefore.

2. The claim was instituted through a Memorandum of Claim dated 12th May 2017 wherein the following reliefs and orders were sought thus;

- I. *A declaration that the termination of the Claimant by the Respondent on the 11th April 2016 was unfair and unlawful.*
- II. *An order compelling the Respondent to pay the Claimant his terminal benefits amounting to Kshs. 1,057,525.*
- III. The costs of this suit with interest thereon at court rates.

3. Upon being served with summons to enter appearance, the Respondent did enter appearance, and file a Memorandum of Reply dated 5th July 2017, denying the Claimant's claim and entitlement to the reliefs sought. In response to the Memorandum of Reply, the Claimant filed a Response to the Memorandum of Reply, dated 17th July 2017. This being the last pleading, at the lapse of the requisite period from the date of its filing, pleadings closed and the matter got destined for hearing on merit.

4. The matter was heard on the parties' respective cases on the 3rd November 2021.

The Claimant's Case.

5. At the hearing, the Claimant urged the Court to adopt the contents of his witness statement dated 12th May 2017, that was contemporaneously filed with the Memorandum of Claim, and of the further witness statement dated 17th July 2017, as part of his evidence in chief, and produced the documents that were filed under his two lists of documents, namely the list dated 12th May 2017, and a further list of 20th July 2017 as exhibits 1-9.

6. It was the Claimant's case that he was employed by the Respondent on the 4th December, 2010 as an Inspector of its public service vehicles. The contract of employment between him and the Respondent was oral. The Director of the Respondent, Mr. Bonface Mutunga Kaleli, gave him the job. His salary was Kshs. 10,000 [Ten Thousand].

7. He asserted that his duties included; the inspection of tickets, checking for any irregularities thereon; ensuring that every passenger on board the Respondent's vehicle[s] was issued with a ticket; ensuring that the passengers adhered to safety regulations whilst on board; checking on insurance covers of the motor vehicles;

8. The Respondent's vehicles used to ply on Machakos-Mombasa, and Nairobi-Machakos-Syotuvuli routes. He was directly reporting to the

director of the Respondent.

9. The Claimant asserted that on the 11th April 2016, the Respondent without notice terminated his services. The termination was oral. He was told not to report to work again. He was not given any termination letter or a certificate of service. He was not paid his terminal dues.
10. The Claimant alleged that he was not given any notice and or reasons for the termination. Following the termination, he approached the Transport Workers Union Kenya, who wrote a letter to the Respondent through the Managing Director on the 27th April 2016. The letter required the Respondent's director to allow a meeting with the representatives of the union on the 4th May 2016, to deliberate on the Claimant's issue. The Respondent's director neither turned up for the meeting nor responded to the letter.
11. The Claimant was constrained to seek legal advice, and on the 19th January 2017, his Counsel wrote a demand letter, which demand letter did not attract any response or action from the Respondent.
12. He contended that the Respondent's wrongful termination and failure to pay him his terminal dues was malicious, willful, oppressive, and in blatant disregard of the law and his rights.
13. Cross examined by Counsel for the Respondent, the Claimant stated that he was employed by the Respondent, through the managing director, Bonface Mutunga, Kareri. Referred to the card, his document number 1c, under the list of exhibits dated 17th July 2017, he stated that the card indicates who his employer was. He further stated that the company that employed him was **Kathi No Kathoka Services Ltd.**
14. He testified further that in the course of discharging his duties, he was not stationed at any specific place, he would move along those routes, along which the Respondent's vehicles were plying. At the end of each day, he had to make a report to the Managing Director. He was only answerable to the Director, The Director had an office in Machakos town, at a certain petrol station.
15. Referred to the salary vouchers, the Claimant confirmed that the, salary reflected as being paid thereunder is Kshs. 10,000, the signature on it is his, and, employer's signature is not on the document. As regards the daily reports, he stated that, at the handing over, the director was not acknowledging receipt of the same by putting his signature thereon.
16. Further under cross examination, the Claimant stated that he would report for work at 3:00 am. and close at 8:00pm. The denial by the Respondent that he was not its employee is unfounded.

The Respondent's case

17. The Respondent tendered its defence through Mr. Bonface Mutunga Kaleli. The witness described himself as its Managing Director. When the witness appeared in Court for the Respondent's case, he urged the Court to adopt his witness statement as his evidence in chief, and admit the documents that the Respondent filed under the list of documents dated 28th September 2021, as the Respondent's exhibits 1-3, namely, copies of insurance covers, copies of Inspection certifies and certificate of incorporation. There was no protest by the Claimant, consequently the adoption and admission were done.
18. The witness stated that the Claimant was a complete stranger to him.
19. The witness contended that the Respondent is a registered PSV Operator majorly operating between Machakos County and Nairobi County and Machakos and Nairobi County over the years, it carries out its activities diligently, according to the traffic rules, National Transport and Safety Authority Regulations and the Co-operative Societies Act and Rules and the by-elections made thereunder.
20. The witness contended further that at no time did the Respondent orally employ the Claimant as its inspector with the description to inspect the tickets, seat belts, insurance covers, maintenance of vehicles and excess passengers. The issue of maintenance of the company vehicles has always been done by the company mechanic who would do inspection of each vehicle twice a week.
21. He further stated that the Respondent is a member of Umonwa Sacco Society. The society has got its employees working as stage managers who would ensure that before the vehicle leaves the stage, it has passengers to full capacity destined to the operating routes. That the Respondent regularly pays the Sacco inspection fees, and route maintenance fee, therefore it would make no sense for it to employee people to do same tasks.
22. Pointing on the bundle of receipts that the Claimant has placed before this Court in support of his case, the witness asserted that the receipts are not genuine, they are doctored. He took the view that the documents were made purposely for this case and to mislead the Court.
23. All through, the Respondent company has been paying its drivers and conductors Kshs. 500 and Kshs. 300 respectively, on a daily basis. Currently they earn Kshs.800 and 600, respectively. That the Respondent does not employ them on a monthly basis, owing to the nature of the industry.
24. The Claimant's case is unfounded. If at all the Respondent had to employ him, it would have employed him as either a conductor or driver. It has never employed any person as an inspector with no defined place of work and time.
25. The payment vouchers are doubtful and not genuine. They are not signed by any of the officials of the Respondent company. The identification card that the Claimant has placed before Court is a forgery, the Respondent never gives identification cards to its drivers and conductors.

26. Under cross examination, the witness admitted that in the 1st paragraph of his witness statement he has described himself as the Managing Director of **Kathi No Kathoka ServiceLtd**. That the address obtaining on, the identification card tendered by the Claimant as evidence, on the salary vouchers, the voucher dated 3rd September 2014 under the name **Kathi No Kakoka Success ltd**, the daily inspection report under the name **Kathi No Kathoka Services Ltd**, is P.O Box 231-90100. The address obtaining on the Certificate of Incorporation for **Kathi No Kakoka Success Ltd**, too.

27. The witness stated that he did not receive the demand letter by counsel for the Claimant. He further stated that his offices are in Machakos Town along Gitiro road. He has never seen the Claimant at all.

28. Further in his evidence under cross examination, the witness stated that for all those workers working on the Respondent's vehicles, the Respondent had a roll, roll which it has given to the Sacco.

29. The witness confirmed that all the documents he had tendered before court as evidence, were for the year 2018, and none for 2010-2016. He confirmed that their vehicles operate between Machakos and Makueni, others on the Machakos- Nairobi route, and Machakos- Siyoberi.

30. Under re-examination, the witness stated that there is no other company with whom their company shares an address.

The Claimant's Submissions

31. Counsel for the Claimant in his written submissions identifies four issues as the ones that present themselves for determination in this matter. Thus;

I. Was the Claimant employed by the Respondent?

II. If yes, was the Claimant unfairly terminated?

III. Should the Claimant be paid the reliefs claimed for?

IV. Who should bear the costs of this suit?

32. It was submitted that the Claimant sued, **Kathi No Kakoka Services Limited**, the Respondent. That he testified that the person who employed him was the Managing Director of the Respondent, Bonface Mutunga Kaleli, who in his evidence presented himself as the Managing Director of the Respondent Company. That to demonstrate that he was an employee of the Respondent, the Claimant produced an official identification card [exhibit 4], and salary payment vouchers [exhibits 5 and 6]. Further that, the salary payment vouchers for the year 2011, 2012 and 2013, only had the name **Kathi No Kakoka**, while the one dated 3rd September 2014 had **Kathi No Kakoka Services Limited**. All these documents bore the same address, P.O Box 231-90100 Machakos, and telephone number, 044-21450.

33. That the dairy inspection reports for 2010-2015, tendered as evidence by the Claimant were all in the name of the incorporated company, **Kathi No Kakoka Success Limited**. That the witness stated that the Company, **Kathi No Kakoka Success**, was incorporated on 14th February 2005, with a postal address, 231-90100. The number is same as for Kathi No Kakoka Services. He summed up his submission on this by stating that, **Kathi No Kakoka Services Limited and Kathi No Kakoka Success Limited** are the same or for Bonface Mutunga Kaleli. For purpose of the transport business, the said director used the companies interchangeably.

34. Counsel submitted that Section [10][7] of the Employment Act, stipulates that if in any legal proceedings an employer fails to produce a written contract or written particulars prescribed in subsection [1] the burden of proving or disproving all an alleged term of employment stipulated in the contract shall be the employer. The Respondent did not discharge the contemplated burden, as he failed to produce any written agreement.

35. He urged this court to find that for purposes of this matter, the Claimant was an employee of the Respondent. He placed reliance on the decision in, **Jacob Alemu Zewde v Sauti Moja Marsabit & Another [2021] eKLR**.

36. The Claimant gave the routes on which the vehicles operated. The same were admitted by the Respondent and even by the Sacco documents which it produced demonstrated this. He would not have known all these if he was not employed by the Respondent.

37. He further submitted that, the Respondent's allegation that the documents tendered by the Claimant were forged was a mere assertion without prove.

38. On the second issue, Counsel urged this Court to find that Respondent terminated the Claimant's employment unfairly. He further urged the Court to be persuaded by the holding in **Daniel Kiplagat Kipkeibut v Sme Deposit Micro Finance Limited [2016] eKLR**, thus;

“The Claimant further seeks to rely on the authority of Walter Ogal Auro vs Teachers Service Commission [2013] eKLR where the Court held that;

..... For a termination of employment to pass the test of 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.”

As a test to conclude that the termination was unfair.

39. Counsel draws the Court's attention to the provisions of Section 45[4] [b] of the Employment Act which stipulates that a termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employee.

40. The Claimant was terminated without any reason being accorded to him. The Respondent did not render any to court, it only gave the matter an escapist approach. The Respondent deviated from the requirements of the law in terminating the employment of the Claimant. The Court should upon the premise find that the termination was unfair and wrongful.

41. On the reliefs sought by the Claimant, Counsel submitted that under section 35 of the Act, the Claimant is entitled to notice pay, one month's salary in lieu of notice. He argued that as at the time the Claimant's employment was being terminated, the applicable Regulation of Wages [General] [Amendment] Order 2015, was applicable. Under the Order, the Claimant was entitled to a basic salary of Kshs. 13,259.30 and a house allowance of Kshs. 1988.90, therefore a gross salary of Kshs. 15,248.19, since he was a vehicle service worker.

42. Submissions were made on the Claimant's claim on underpayments, to the effect that at all material times, the Respondent paid him salary that was below that which he ought to have been, under the Wage Orders that were in place at those times. Under the Wage Order that was in force in the year 2011, the basic salary and house allowance that the Claimant was entitled to was Kshs. 9182 and Kshs. 1377, respectively. Therefore, in that year he was underpaid Kshs. 559.30 monthly, and cumulatively therefore an underpayment of Kshs. 6711.60.

43. It was further submitted that under the Wage Order that was in force in the year 2012, a person who was working as a vehicle service worker was entitled to a basic salary of Kshs.10,348.80 and a house allowance of Kshs. 1246. In that year he was underpaid by sum of Kshs. 19,571.71.

44. That for the years, 2013 and 2014, he was cumulatively underpaid by a sum of Kshs. 86,746.74.

45. In 2015, under the relevant Wage Order, the gross salary for an employee like the Claimant, was Kshs. 15,248 therefore considering what he was earning, there was an underpayment of Kshs. 5,248.19 per month, therefore Kshs. 62,978.28 in total. The total under payments were Kshs. 176,008.30.

46. It was contended that the Claimant was entitled to a safari allowance of Kshs. 170 shillings per a day, which amount he was never paid. He is therefore owed a sum of Kshs. 163, 200 under this head. That during the currency of the employee -employer relationship, the subject matter of this claim, the Claimant was not accorded off- duty days. He should be compensated to an extent of Kshs. 139,225.65.

47. That the Claimant was never accorded an opportunity to proceed for leave. This notwithstanding, he was not compensated for the untaken leave days. In the submissions, counsel computed the alleged compensation amount due and owing at Kshs. 46,407.55.

48. It was further submitted that the Claimant is entitled to gratuity, the Respondent was not remitting any sums to NSSF. Kshs. 35,358, should be awarded under this head.

49. It is submitted that since the termination of the Claimant's employment was unfair and wrongful, the Respondent should be condemned to compensate the Claimant pursuant to the provisions of Section 49 of the Employment Act, to an extent of 12 months gross salary, therefore Kshs. 120,000.

The Respondent's Submissions

50. The Respondent's Counsel has put forth three issues as those he discerns as emerging for determination in this matter.

I. ***Whether there existed employer/employee relationship between the Claimant and the Respondent.***

II. ***Put it differently, whether the Respondent is associated with the Claimant.***

III. ***Who should be condemned to pay the costs?***

51. On his first proposed issue, Counsel submitted that it is trite law that he who asserts must prove. That despite asserting that he was employed by the Respondent and subsequently dismissed from employment on the 11th April 2016, the Claimant was unable to establish through evidence that the Respondent did exist as a legal entity. The Claimant sued **Kathi No Kakoka Services Ltd** and that he even forged a job card to demonstrate that he was an employee of the Respondent. On the other hand, **RW1**, Mr. Bonface Mutunga Kaleli testified that he doesn't know a company by the name **Kathi No Kakoka Services Ltd**, instead he is a director of **Kathi No Kakoka Success Ltd**. He produced a certificate of registration of this company. It is strange that the Claimant would work for the Respondent for close to 6 years but fail to know the true name of his employer.

52. It was further submitted that the Claimant failed to tender sufficient evidence in prove as to who employed him, and his job description. That his evidence was contradictory. The Claimant asserted on the one hand that he was working from 3:00 am to 8:00 pm, and on the other that he would hand over the daily reports to the Managing director daily, Counsel poses the Question, at what time then would he report to the supervisor?

53. Counsel contended that the Respondent's evidence that its offices are located at its Garage located within Machakos Town, was

uncontroverted. That the evidence disabused the Claimant's that he was employed by one Bonface Mutunga at the offices at Kenol Petrol Station. That in sum this brings the Claimant out as a dishonest witness, consequently his evidence cannot be said to be credible.

54. Counsel attacked the salary payment vouchers that were tendered in evidence, stating that they were not signed by the employer and therefore nothing would link them to the Respondent. Further that while some of the vouchers had serial numbers, others did not,

55. The Claimant failed to establish the connection between the two entities, **Kathi No Kakoka Services Limited** and **Kathi No Kakoka Success Limited**. In Counsel's view, the Claimant ought to have called an independent witness to testify in support of his case and more specifically on the connection.

56. It was further submitted that nothing would have been easier than the Claimant producing a letter of employment to show that indeed he was an employee of the Respondent.

57. On issue two, Counsel submitted that the Respondent has been sued as a legal person, yet it does not exist as such. The Court cannot enter judgment against a non-existent legal entity.

Analysis and Determination.

58. The following issues are the ones that present themselves for determination in this matter. Thus;

I. *Whether the Respondent was properly sued.*

II. *Whether the Claimant was an employee of the Respondent at the material time or at all.*

III. *If the answer to [ii] above is in the affirmative, was his employment terminated, and if so was the termination unfair and wrongful?*

IV. *What reliefs are available to the Claimant, if any?*

V. *Who should bear the costs of this matter?*

Whether the Respondent was properly sued.

59. The Respondent's witness contended *inter alia* that he did not know of the company sued, **Kathi No Kakoka Services limited**. In an attempt to demonstrate that the Respondent as sued does not exist, and that he is a stranger to it, the witness tendered as evidence a certificate of incorporation for a company known as, **Kathi No Kakoka Success Ltd**. Counsel who appeared for the Respondent submitted that the entity sued is not a legal entity, and that the Claimant had failed to demonstrate that it was. In the submission, he got emboldened by the certificate of incorporation foretasted.

60. The Claimant in his Memorandum of Claim, averred;

"2. The Respondent is a limited liability company offering transportation services and incorporated in the Republic of Kenya registered under the Company's Act Chapter 486 of the Laws of Kenya now Companies Act 17 of 2015 and its address of service for purposes of this suit shall be P.O BOX 231- 90100 Machakos. Service of Summons shall be through the Claimant's Advocates' Offices."

In paragraph 2 of the Memorandum of Reply, the Respondent averred;

"The Respondent admits paragraph 1 and 2 of the Memorandum of Claim in so far as the same relates only to the description of the parties....."

61. The Respondent clearly admitted the description that was accorded to it as a legal entity incorporated as stated in the Memorandum of Claim. Further when one looks at the contents of the Memorandum of Reply in their totality, the tone that emerges therefrom is one that is in agreement with the existence of the Respondent and as a legal entity. In cross examination the Respondent's witness admitted that in his witness statement, turned evidence in chief, he has described himself as the Managing director of the Respondent.

62. The production of the certificate of incorporation for the other entity does not help the

Respondent's case in any manner. It has not been demonstrated how the existence of that other entity [**Kathi No Kakoka Success Ltd**], would be an impediment to the existence of the Respondent herein, or the possibility of the entity going by its name [the Respondent's] being in existence. It is common knowledge that a person can be a managing director of more than one company or business entity.

63. If indeed the Respondent wasn't in existence as a legal entity, how would it enter appearance and file defence, without protest? how would the witness testify on its behalf as he did? who instructed counsel? These questions required an answer from the Respondent, they didn't get any.

64. By reason of the foregoing premises, and the appreciation that parties are bound by their own pleadings, I am prepared to agree with Counsel for the Claimant that the Respondent was only engaging an escapist approach, which unfortunately could not succeed. I consequently find that the Respondent was properly sued.

65. In **Josephine Mwende vs- University of Nairobi, Cause 1110 of 2017**, this Court stated

“ Before I delve further into this issue, it is imperative to state from the onset that the issue of the government circular and the contract of employment being or becoming irregular and illegal as a consequence of the directive therein, was a matter that was not pleaded by the Respondent. It is here that I must comment on the importance of pleadings and the implication of a party venturing out of what he or she has pleaded.

31. No doubt, numerous judicial attention has been given on the importance of pleadings and the implication on a party's dwelling on matters not pleaded or that cannot be ascertained from its pleadings. In **Adetoun Oladeji [NIG]Ltd V Nigeria Brewaries PLC.S 91/2002**. Judge Pius Aderemi J.S.C expressed himself;

“ It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

Whether the Claimant was an employee of the Respondent at the Material times or any time at all.

66. With due respect, the Respondent allowed itself to be unnecessarily blurred in presentation of its evidence and submissions to Court by its escapist approach. In its evidence, it directed immense effort towards the attempt to demonstrate the non-existence of it, as sued. One of the reasons advanced by the Respondent to persuade this Court to find that the Claimant was never employed by the it at any time was the alleged non-existence of it as a legal entity, an allegation which I have found to be without merit. As a result, the point does not in any manner come to the aid of its case.

67. The Claimant asserted in his evidence that he was employed by the Respondent through its Managing director, who happened to be the witness who testified in this matter on behalf of the Respondent. The Claimant, narrated in his evidence, the tasks that his position as an inspector entailed, he tendered various documents in evidence towards demonstrating that indeed at various times he discharged the tasks. He produced passenger tickets, and daily reports that he normally prepared for the managing director. One cannot agree therefore with the Respondent's Counsel's submission that the Claimant did not tender any evidence as regards his job description. In his evidence too, the Claimant was express that he was answerable to the director, therefore it is not correct for Counsel for the Respondent to assert that he did not testify regarding under whose instruction or control he was.

68. The Claimant placed various documents before court, documents that would point to the fact that he was an employee of the Respondent. The Respondent's witness boldly asserted that the documents were forged, and created only for purposes of this matter. No doubt, this is a very heavy indictment. It would be expected on any reasonable man, faced with the situation as is the Respondent, and who has taken a position as the Respondent has, to have taken action, including reporting to the matter to the police for investigation, or to conduct any investigation whose outcome would aid buttress its position. In stating this I am conscious of the fact that where one alleges fraud against the another, the burden on him to prove the allegation is heavier than that on a balance of probabilities, but not beyond reasonable doubt. Besides the bald allegation, I do not see any evidence by the Respondent that proves the allegation of fraud.

69. The tickets that the Claimant placed before this Court have registration numbers that he alleged belonged to the Respondent's vehicles. The Respondent does not contest the fact that it owned the vehicles at the material time. If it didn't, nothing could have been easier than for it to specifically state so. I note that all the documents that the Respondent placed before this Court more specifically the copies of the Insurance covers, and copies of Inspection certificates relate to the year 2018, not the period the subject matter herein. One wonders why the choice of the documents in that manner. I cannot help but make an adverse inference that had the documents for the period in issue been produced, the contents therein could have been prejudicial to the Respondent's case.

70. The Claimant stated that upon joining the Sacco, the Respondent maintained its employees. The Respondent's witness in his evidence under cross examination stated that it had a roll of all those employees it handed over to the Sacco, to continue working in its vehicles. In my view if this were to be considered true, production of the roll in Court as evidence was imperative, owing to the diametrically opposite positions that were taken by the parties on the issue, relationship between them.

71. The Respondent argued that it did not have inspectors in its workforce, because the service of inspection is one that the Sacco offered, and that they paid for. There was no document that was placed before this Court to prove that it is a service that was being offered and paid for as such.

72. By reason of the premises, I am inclined to come to a conclusion and I do that at all material times, the Claimant was an employee of the Respondent.

Whether the Claimant's employment was terminated, and if so whether the termination was fair.

73. The Claimant asserted that his employment was orally terminated. The Respondent, I think owing to the position that it had taken as hereinabove expressed, did not at all assail the Claimant's evidence that he was terminated and in the stated manner. Consequently, I conclude that his employment was terminated orally.

74. Having found as I have hereinabove, I now turn to whether the termination was fair. In the case of **Lydia Moraa Obara v. Tusker**

Mattresses [2021]eKLR this Court stated;

“31. Section 45 of the Employment Act dictates that no employer shall terminate employment of an employee unfairly. Section 45[2] [c], provides the foundation for insistence on engagement of a fair procedure if the termination of employment were to be considered fair.”

75. In **Janet Nyandiko v. Kenya Commercial Bank Limited [2017]eKLR**, the Court held and which holding was cited with approval by the Court of Appeal in the case of **National Bank of Kenya v Anthony Njue [2019]eKLR**, thus;

“Section 45 of the Employment Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee’s conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity. The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also, not to be overlooked is the conduct and capability of the employee up to the date of the termination, the extent to which the employer has complied with the procedural requirements under section 41.....”

76. Section 41 of the Act, provides for what must be present in the process leading to the termination of an employee’s employment, in order for it to be considered procedurally fair. The procedure contemplated thereunder has three components, the information component, the hearing component and the consideration component. Absence of any of these components will automatically lead to a termination of an employment of an employee or summary dismissal of an employee, procedurally unfair. It is duty upon the employer to establish that the statutory procedure was adhered to. In the instant matter, the Respondent did not lead evidence to demonstrate that the Claimant was informed of the grounds that formed the basis for the termination, that he was allowed to answer to those grounds, and that the Respondent did consider any representation made in the manner stipulated in the provision.

77. In the upshot, it is this Court’s conclusion that the termination of the Claimant’s employment was procedurally unfair.

78. Section 43 of the Act places upon the employer a legal obligation whenever there is a dispute over termination of an employee’s employment, to prove the reason or reasons for the termination. As indicated hereinabove, blurred by the evasive approach it gave the matter, the Respondent did not produce any evidence from which one can discern the reasons for the termination. Consequently, one cannot find it difficult to state as this Court does, that the Respondent did not discharge the burden under the provision. As a consequence of the failure, the implication contemplated under Section 45[2] of the Employment Act sets in, the termination is hereby deemed unfair in terms of section 45[2] of the Act.

79. The termination was substantively unfair.

What reliefs are available, if any to the Claimant.

80. Having found the termination to have been both procedurally and substantively unfair, I now turn to the reliefs sought by the Claimant against the Respondent. The Claimant contends that his employment was terminated without notice. I am of the view that his employment was one terminable under the provisions of Section 35 of the Employment Act, by notice. As the notice contemplated thereunder was not issued, I am convinced that he is entitled to a notice pay, equivalent to a one month’s pay. Shortly hereinafter, the Court will find that the Claimant has not proved that he was supposed to be earning Kshs. 15,248.19 under the Wage Orders, he sought to rely on. The Claimant is therefore awarded Kshs. 10,000 under this head.

81. The Claimant contended that at all material times, the Respondent did not pay his salary in adherence to the Wage Orders that were relevant at the various times within the material times. He presented himself as falling under the category of “Vehicle service worker” provided for under the various Orders during the period in issue. I have Considered all the Orders mentioned by the Claimant and submitted on by his Counsel, and what strikes my mind is the fact that the vehicle service workers referred to therein are those who were working in petrol and service stations. The Orders were such specific. Consequently, I am of the view that the Claim for underpayments on the basis that the Claimant was a vehicle service worker, is not well placed and it is for the declining. I decline to make any award therefore under the claim.

82. He further claimed for what he termed as Safari allowance, Kshs. 163,200. It was submitted by his Counsel that he testified that he was entitled to Kshs. 170 per a day, which amount he never received even for a single day. I have considered the two witness statements that were filed herein by the Claimant, statements which by consent of the parties were adopted as his evidence in chief, his testimony under cross examination, and re-examination, I have no doubt in my mind that there was no iota of evidence that was brought out on the claim. It was unproven. It is declined.

83. For similar reason, absence of evidence in prove, I decline to award the claims for off duty compensation, and overtime. The practice of just throwing figures to Court must come to an end.

84. The Claimant has Claimed for gratuity or service pay, Kshs. 35,358. It was argued that the Respondent was not making any remittances to the National Social Services Fund [NSSF] on behalf of the Claimant. The Claimant seems to take gratuity and service pay to be the same and one thing. That is far from the truth. This was aptly captured in the case of **H. Young & Company EA Ltd v. Javan Were Mbagu [2016] eKLR**, by the Court of Appeal thus;

*“This Court in **Central Bank Of Kenya vs. Davis Kivieko Mutei [2009]eKLR** emphasized that there is a difference between severance pay and gratuity. Gratuity as correctly enunciated by this Court in **Bamburi Cement Ltd vs Farid Aboud Mohammed [2016] eKLR** denotes a gratis payment by an employer in appreciation of service. There is no express provision for gratuity in the Employment Act. It is usually payable under terms set out in a contract of service or collective bargaining agreement.”*

85. In the circumstances of this matter I can only grant the figures sought, as service pay pursuant to the provisions of section 35 [5] of the Employment Act, 2007. Accordingly, the Claimant is awarded service pay amount of Kshs. 35,358.15.

86. Bearing in mind the provisions of Section 90 of the Employment Act, I can only grant untaken unpaid for leave days for the three years preceding the date of filing this claim. Not the five years sought by the claimant. Therefore, Kshs. 27,844.50. Leave to employees is a statutory entitlement, and an obligation on the employer to ensure that the right is realized, under section 28 of the Employment Act. Where an employee alleges that he did not enjoy this right during the currency of the employment fully or to a certain extent, then it behooves the employer to disabuse the allegation by tendering evidence before the trier. The Respondent as the employer didn't.

87. Having found that the Claimant's employment was unfairly terminated, and considering the circumstances how, I am of a firm view that the Claimant is entitled to a compensatory relief under the provisions of section 49 of the Employment Act. Considering the approach that the Respondent gave this matter, approach which was not geared to aid justice, its non-compliance with the law in matters termination of an employee's employment, the length of service by the Claimant, and that there is no evidence suggesting that he contributed to the termination, I award him Kshs. 100,000 representing ten months' gross salary.

88. It is trite law, that costs follow the event. The event here being a successful litigation by the Claimant, costs shall be in his favour.

89. In the upshot judgment is entered in favour of the Claimant in the following terms;

I. A declaration that the Claimant was an employee of the Respondent at all material times, and his employment was unfairly terminated.

II. Notice pay of Kshs. 10,000.

III. Compensation pursuant to the provisions of section 49[1][c] of the Employment Act, 2007, Kshs. 100,000.

IV. Service pay, Kshs. 35,358.

V. Untaken, unpaid leave days' Compensation, Kshs. 27,844.50.

VI. Interest on [ii], [iii], [iv], and [v], above at court rates from the date of filing this suit till full payment.

VII. Costs of this suit.

READ, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2022.

OCHARO KEBIRA

JUDGE