



**Macharia v Pearl Beach Hotels Limited T/A (English Point Marina (Cause 871 of 2017) [2022] KEELRC 1219 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1219 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 871 OF 2017**

**AK NZEI, J  
APRIL 28, 2022**

**BETWEEN**

**CHRISPIN IKOHA MACHARIA ..... CLAIMANT**

**AND**

**PEARL BEACH HOTELS LIMITED T/A (ENGLISH POINT  
MARINA ..... RESPONDENT**

**JUDGMENT**

1. The Claim herein was instituted by the claimant vide a Memorandum of claim dated October 30, 2017 and filed in court on November 20, 2017. The claimant pleaded:-
  - a. that the claimant was employed by the respondent on July 20, 2016 as an Information Technology Administrator earning a monthly salary of ksh.60,000 as at the time of termination on July 23, 2017.
  - b. that on May 26, 2017, the claimant was accused of poor performance and was issued with a notice to show cause to which he responded on the same day, and was summarily dismissed on July 23, 2017.
  - c. that the claimant was not aware of, and did not take part in a disciplinary meeting alleged to have taken place on June 22, 2017.
  - d. that the decision to terminate the claimant's employment was unfair, unprocedural and unlawful since the requirements set out in sections 41, 43 and 45 of the *Employment Act*, 2007 were not adhered to and the claimant was not accorded a fair administrative action through observance of the rules of natural justice as expressly envisaged in section 45(5) of the *employment Act* 2007, and that termination of the claimant's employment was in breach of articles 41 and 47 (1) of the *Constitution* of Kenya and *ILO Convention 158 on termination of employment*, 1982.



- e. That failure by the respondent to proffer factual and genuine reason for terminating the claimant's employment violated the mandatory provisions of the Employment Act, 2007.
  - f. that the respondent is obligated, under section 18(4) of the Employment Act, to pay to the claimant all the monies, allowances and benefits due to the claimant upto the date of dismissal.
  - g. that the claimant was discriminated against on medical grounds, and was forced to serve one month notice at work against the doctor's advice, hence violating the Claimant's right under article 27(4) of the Constitution of Kenya 2010.
2. The Claimant claimed against the Respondent:-
    - a. One month salary in lieu of notice .....ksh.60,000
    - b. 21 days unpaid leave .....ksh.60,000
    - c. Unpaid public holidays (32 days xksh.,2,307).....ksh.174,648
    - d. 12 months compensation for unfair termination (ksh.60,000x12 months) .....ksh.720,000
  3. The claimant also prayed for general damages for discrimination on medical grounds and for being compelled to work while undergoing treatment, a declaration that his termination was unfair and that failure to issue the claimant with a certificate of service attracts penal consequences under section 51 of the Employment Act, 2007.
  4. The claimant filed a detailed witness statement dated October 30, 2017 and a list of documents dated the same date, listing some ten documents, both of which accompanied the Memorandum of Claim.
  5. The respondent entered appearance on December 13, 2017 and subsequently filed Response to the claimant's claim on March 8, 2018. The Respondent denied the Claimant's claim and further pleaded:-
    - a. that the Respondent had, through a process, established that the Claimant's performance was wanting,x
    - b. that a proper disciplinary hearing was commenced and the Claimant was given an opportunity to participate fully.
    - c. that the claimant was summarily dismissed and his termination was procedurally undertaken within the ambit of the Employment Act.
    - d. that the Claimant's dismissal was valid and lawful.
  6. On May 10, 2021, the respondent filed a witness statement by one Nazir Jinnah (dated 24<sup>th</sup> May 2021) and a list of documents listing some seven documents.
  7. Hearing of the suit is shown to have commenced on May 26, 2021 when the claimant testified partly and was stood down due to (internet) connectivity challenges. When the matter came up for further hearing before me on November 15, 2021, I directed the claimant to start his case afresh.
  8. The claimant adopted his witness statements dated October 30, 2017 as his testimony and further testified, both in chief and under cross examination:
    - a. that the claimant was employed by therespondent as an IT Administrator incharge of IT infrastructure earning ksh.60,000 gross salary per month; and started working on August 1, 2016.



- b. that the Claimant worked for one year before termination in July 2017.
  - c. that before termination, the Claimant was served with a show cause letter dated May 26, 2017, generally accusing him of not being diligent without giving any specific particulars.
  - d. that the claimant responded to the show cause letter on the same date (May 26, 2017) and was invited for a disciplinary hearing on May 27, 2017 at 11.00 am; which he attended but never received any feedback. That he continued working.
  - e. that around May 30, 2017, the claimant fell sick and was allowed sick off days by the Respondent's Human Resource Manager, Agnes Kariuki, and subsequently went back to work on June 19, 2017, though still sick and under medication.
  - f. that the claimant asked for more days which were granted, but he was called back while sick and asked to resume work immediately.
  - g. that the claimant went back to work and produced his medical report stating that he was not fit to resume work, but which the respondent's Human Resource Manager rejected.
  - h. that on July 8, 2017, the claimant was handed a termination letter.
    - i. that the termination letter referred to a disciplinary meeting held on June 22, 2017, yet the Claimant had attended a disciplinary meeting on May 27, 2017 at 11.00 a.m.
  - j. that the termination notice was written on June 23, 2017, a date on which the clamant was at work.
  - k. that the allegations of lack of diligence were untrue, the claimant had not been given any warning letter, there were no appraisal reports/letters for workers and no complain had been raised against the claimant.
  - l. that although the termination notice talked of thirty days notice, the letter was given to the claimant on July 8, 2017, and as such there was absence of thirty days' notice.
  - m. that the claimant had not been informed that his sick-off days would act as his leave and off days.
9. The respondent's witness (Nazir Jinnah – RW-1) told the court that he was a director of the Respondent Company. He adopted the witness statement referred to in paragraph 6 of this judgment and produced as exhibits the documents referred to in the same paragraph.
10. The Respondent (RW-1) further testified:-
- a. that on May 22, 2017, RW-1 issued the claimant with a show cause due to lack of diligence in performance of duty and absconding duty, to which the claimant duly responded.
  - b. that therespondent was not aware of the claimant's sickness; and there was no request for sick leave in theclaimant's file.
  - c. that the claimant was invited for a disciplinary hearing on May 27, 2017, and was requested to bring a witness of his choice.
  - d. that after the disciplinary hearing on May 27, 2017, theclaimant was issued with a notice of termination, which he duly received on July 8, 2017 after absconding duty.



- e. that at some point, the respondent questioned the legitimacy of medical documents availed by the claimant, but the claimant never availed any authentication.
  - f. that the claimant cleared with the respondent and was paid his calculated dues.
  - g. that the claimant acknowledged full payment and confirmed that he had no further claim against the Respondent.
  - h. that the respondent has all along been ready to issue the claimant's Certificate of Service but the claimant never requested for it, and never returned to the respondent's premises since the date he was paid.
    - i. that between May 22, 2017 and July 8, 2017, the claimant was not aware that his services had been terminated, and he remained an employee of the Respondent.
  - j. that the respondent did not issue another notice to the claimant.
11. Upon considering the pleadings filed and evidence presented by both parties, issues that fall for determination, in my view, are as follows:-
- a. whether termination of the claimant's employment was fair.
  - b. whether the claimant is entitled to the reliefs sought.
12. Before making a determination on the first issue as to whether termination of the claimant's employment was fair, it is important to review the procedure adopted by the respondent in terminating the claimant's employment.
13. On May 26, 2017, the respondent issued a show cause letter to the claimant stating as follows:-
- “It has come to the management's attention that you are not delivering in your duties.
- Several complaints are about you not executing tasks given to you. When a head of department asks you to attend to something, you take time to do it and do not even inform them the reason for your delay.
- Whenever you are given a task to do, you end up leaving for home, without completing the task and do not even communicate this to your manager.
- It has been said time and again in the morning briefings that whenever we are having an event, the venue must be set and ready for use a day prior to the event taking place.
- This has however not been the case. You do not set up the venues on time and fail to come early to make sure that all is set and ready for use by the clients.
- The clients end up waiting for you to do the set-up which is very unprofessional.
- You are hereby required to show cause in writing by 26/5/2017 at 12.00 pm why disciplinary action should not be taken against you failure to which management reserves the right to take necessary disciplinary action without further reference to you.”
14. The claimant responded to the show cause letter on May 26, 2017, and both parties were in agreement in their respective testimonies in court, both in chief and under cross examination, that a disciplinary hearing was held on May 27, 2017 pursuant to an invitation letter dated May 26, 2017.



15. The claimant testified that the outcome of the disciplinary hearing held on 27<sup>th</sup> May 2017 was never communicated to him; and that he continued working and being the respondent's employee. This position was not controverted by the respondent.
16. On June 23, 2017, the respondent issued a Notice of Termination (of employment) to the claimant, which notice, according to the evidence of both parties, was not given to the claimant until July 8, 2017. The notice of termination reads as follows:-

“With reference to the disciplinary hearing held on 22/6/2017 at 03.30 pm in the IT Maintenance Office to discuss your performance, I regret to inform you that management has decided to terminate your services.

The result of the meeting have come late due to the high business levels and your being away from work on sick leave. On resuming duty you did not present your sick sheet to the Human Resource Office.

Your employment contract will be terminated with effect from July 23, 2015 on expiry of thirty (30) days' notice commencing 23/6/16 in accordance with the termination clause in your contract dated August 1, 2016...”
17. It is clear from the wording of the Notice of Termination of the claimant's contract of employment that the termination was made pursuant to a disciplinary hearing held on June 22, 2017 at 03.30pm. The Claimant was categorical in his evidence that he did not attend any disciplinary hearing on June 22, 2017. On its part, the respondent did not demonstrate that the Claimant had been invited for any disciplinary hearing on June 22, 2017 at 03.30pm. The respondent did not, in their testimony in Court, testify that there was any mistake in the Notice of Termination. The court cannot re-write or give different interpretation to documents produced in evidence by parties.
18. Further, the notice of termination of the claimant's employment stated that it would take effect from 23/7/2015 on expiry of thirty (30) days commencing 23/6/2016. Again, the respondent did not tell the court that there was any mistake in the notice of termination. The court cannot re-write what parties have written or assign different meaning or terms to it.
19. The upshot of the above is that the claimant's employment was terminated on the basis of alleged disciplinary proceedings other than those that commenced vide a show cause letter dated May 26, 2017 and which culminated in a disciplinary hearing held on May 27, 2017, which the claimant attended.
20. Whereas the respondent may have complied with the procedural requirements set out in section 41 of the *Employment Act* regarding disciplinary proceedings culminating in the disciplinary hearing of May 27, 2017, the contrary is the case regarding the process referred to in the notice of termination of employment letter dated June 23, 2017, on the basis of which the claimant's employment was terminated.
21. It is, therefore, my finding that the respondent did not comply with the mandatory procedural requirements set out in section 41 of the *Employment Act* 2007 in terminating the claimant's employment. The termination was procedurally unfair.
22. Section 41 of the *Employment Act*, 2007 provides as follows:-

“(1) 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, 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.”

23. In the case of *CMC Aviation Limited v Mobammed Noor* [2015] eKLR, the Court of Appeal stated as follows:-

In view of the foregoing, we find that the appellant’s act of summarily dismissing the Respondent without giving him an opportunity to be heard amounted to unfair termination as defined under Section 45 of the *Employment Act*. In *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers SSACCO Limited* [2013] eKLR, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, the employee must be taken through the mandatory process as outlined under section 41 of the *Employment Act*. That applies in a case of termination as well as in a case that warrants summary dismissal. See also *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR. We respectfully agree. Unfair termination involves breach of statutory law, where there is a fair reason for terminating an employee’s service but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of employment contract, like where an employer dismisses an employee without notice or without the right amount of notice contrary to the employment contract. section 49 of the Act sets out the remedies for both wrongful dismissal and unfair termination....”

24. On the second issue, the respondent produced in evidence a document shown to have been executed by the claimant on July 25, 2017 regarding payment of his Final Dues whereby the claimant acknowledged payment of some amount of money in full settlement of his Final Dues and confirmed that he did not have any further claim regarding the same. In my view, an employee’s final/terminal dues include any remuneration for work done before termination, any annual leave pay due to an employee, notice pay due to an employee, severance pay due to an employee if the employee qualifies for it, and service pay.
25. The claimant did not dispute the validity and authenticity of the document referred to in paragraph 24 above, neither did he deny having executed it with full knowledge of its contents. In view of this, the claimant’s claim for one month salary in lieu of notice, unpaid leave and unpaid public holidays cannot stand. The same is declined.
26. The claim for compensation for unfair termination of employment is not in the category of final/terminal dues, and having found that termination of the claimant’s employment was unfair, I allow the claim. I award the Claimant eight months’ salary as compensation for unfair termination of employment. I have taken into account the circumstances in which the claimant’s employment was terminated.



27. Consequently, and having considered submissions filed by counsel for both parties, judgment is hereby entered in favour of the claimant against the respondent for a sum of ksh.480,000 being eight months' salary in compensation for unfair termination of employment.

28. The claimant is also awarded costs of the claim and interest at Court rates.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> DAY OF APRIL 2022**

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**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

**JUDGE**

Appearance:

Miss Oloo for Claimant

Mr. Musyoka for Respondent

