



**Nedunchezian v Crown Solutions Limited t/a Crown Healthcare & another
(Cause 658 of 2019) [2022] KEELRC 1104 (KLR) (19 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1104 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 658 OF 2019
K OCHARO, J
APRIL 19, 2022**

BETWEEN

SIVASHANMUGAM HARUR NEDUNCHEZHIAN CLAIMANT

AND

DIRECTOR OF IMMIGRATION KENYA 1ST RESPONDENT

**CROWN SOLUTIONS LIMITED T/A CROWN HEALTHCARE 2ND
RESPONDENT**

JUDGMENT

1. The Claimant came into the employment of the 1st Respondent on the 14th January 2019 as Head of Technical Services. The Employer-Employee relationship that came into being between them, was short lived. He got terminated on the 22nd August 2019. Holding that the termination was unfair and unlawful, the Claimant commenced the claim herein through his Statement of claim dated 4th October 2019 seeking the following reliefs:
 - a) The Respondent be ordered to pay the Claimant his terminal and contractual dues amounting to Kshs. 6,420,000.00.
 - b) Costs and interest.
 - c) Certificate of service.
 - d) Any other relief that the Court may deem fit.
2. The Statement of Claim was filed contemporaneously with the Claimant's Witness Statement and a bundle of documents that he intended to place reliance on in prove of his case.



3. The Respondent filed a Statement of Response dated 13th November 2019, where in it denied the Claimant's claim and any entitlement to the reliefs sought by him. Like the Claimant, the Respondent filed the response, side by side with the its Witness Statement, and a bundle of documents.
4. The Claimant amended his Statement of Claim on the 18th December 2020 and filed the same on the 22nd January 2021.
5. At the close of pleadings, the matter got destined for hearing interpartes on merit. When the matter came up for hearing on the 27th October 2021, the parties recorded a consent to the effect that the matter be proceeded with by way of adoption of the Witness Statements and the bundle of documents filed herein, as their evidence and exhibits respectively. Consequently, the Court gave timelines for the filing of submissions. The directions were obliged.

The Claimant's case

6. It was the Claimant's case that he got employed by the Respondent on the 14th January, 2019 as the head of Technical Services at the Respondent's Health division. His starting salary was Kshs. 450,000 which was later on reviewed upwards after six months.
7. He asserted that he worked for the Respondent diligently and honesty until the 22nd August, 2019, when his employment was terminated through a letter of the even date. The termination was with immediate effect.
8. He contended that during the period that he worked for the Respondent he did not proceed for leave.
9. The termination for his employment was without the notice that was envisioned in the contract of employment namely 3 [three] months' notice.
10. The Claimant alleged that despite working for the Respondent for twenty-two [22] days in the month of August, 2019, the latter did not pay him salary for the period.
11. According to the Claimant the termination of his employment was unfair and unlawful. He is therefore entitled to the reliefs sought in his pleadings.

The Respondent's case

12. The Respondent's case is enveloped in the Witness Statement of Francis Muthiani, its Finance and Administrative Manager. The witness confirmed that the Claimant was employed as the Head of Technical Services with the Respondent on 14th January 2019.
13. The witness stated that he was retained at a consolidated salary of Kshs. 450,000, an amount which was inclusive of all allowances.
14. It was the Respondent's case that from the time of employment, the Claimant performed dismally and was subsequently terminated with effect from 22nd August 2019.
15. The Respondent alleged that the Claimant had been warned orally on numerous occasions regarding his poor performance and had also been given numerous opportunities to improve and be in accord with the agreed performance standards but the Claimant did not improve at all, leaving it with no option but to terminate him. At the time of termination, he had worked with the Respondent for a period of 8 months.
16. The Respondent contended that under section 45 [3] of the *Employment Act*, the Claimant is therefore not entitled to a claim for unfair termination having not worked for a period of 13 months.



17. The Respondent contended that the Claimant was not entitled to service pay as he was under the NSSF Scheme.
18. The Claimant's pay for the days worked in August 2019, leave days accrued and notice pay as per the contract was not effected as the Claimant neglected and or refused to clear with the Respondent.

The Claimant's Submissions

19. In his submissions the Claimant's counsel brought out and submitted on two issues:
 - a) Whether the Claimant has proved its case to the balance of probability.
 - b) Whether the Claimant is entitled to compensation for unfair dismissal from work.
20. On the 1st issue counsel submitted that though the Respondent alleged that the Claimant's employment was terminated as a result of poor performance, it did not place before Court any document from which it can be discerned that his performance was poor.
21. The manner in which the Claimant's employment came into determination, amounted to a summary dismissal. Yet there is no prove by the Respondent that the Claimant did commit a misconduct[s] that would attract the summary dismissal. The dismissal was unfair.
22. As regards the reliefs, it was submitted that the contract of employment provided for 90 days' notice, and this should be awarded to the Claimant in accord with the provisions of section 36 of the [Employment Act](#). Therefore Kshs. 1,350,000.
23. It was argued that the Claimant proved that during the 8 months he was in the employment of the Respondent, he was not given a chance to proceed for his leave. He is therefore entitled to a compensation of Kshs. 450,000.
24. There is no doubt that the Claimant worked for 22 days in the month of August 2019, that the Respondent failed to pay for this time worked. He is entitled to Kshs. 330,000 under this head.
25. It was contended that contrary to the Respondent's position, the Kshs. 450,000 that the Claimant was earning was basic salary and it was exclusive of House allowance. This can be clearly picked from clause 2 of the appointment letter. That being so, he is entitled to a total of Kshs. 540,000 representing 15% of his total earnings during the 8 months.
26. The Claimant contended that he had proved his case that the termination was unfair, he is therefore entitled to a compensatory relief equivalent to 12 months' gross salary. It was further submitted that the Respondent's position on the provision of section 45 [3] of the [Employment Act](#) was unfounded. Reliance was placed on the holding in ELRC Cause No. 1791 of 2015 – [Joyce Gatwiri Micheni vs. Wandege Co-operative Savings & Credit Limited](#).
27. Lastly, on service pay, the Claimant's counsel submitted that there was no material placed before Court to demonstrate that the Respondent was making any remittances to the NSSF. Therefore, the Claimant is entitled to service pay of Kshs. 300,000.

The Respondent's Submissions

28. According to the Respondent's counsel, the following issues emerge for determination, thus:
 - a) Whether the Claimant's employment was unlawfully terminated.
 - b) Whether the Claimant is entitled to the remedies sought.



29. The Respondent's counsel argued that the Claimant's employment could not have been terminated unfairly in light of section 45 [3] of the *Employment Act*.
30. It was further argued that the Claimant was summarily dismissed he was not entitled to notice before termination. Counsel cited the Court of Appeal holding in the case of *Nation Media Group Limited vs. Onesmus Kilonzo* [2017] eKLR to buttress his submission.
31. He submitted that the Claimant was dismissed for poor performance having been warned on several occasions of the poor performance, a fact that he has not denied.
32. On the reliefs sought by the Claimant, the Respondent submitted that it was not opposed to his claim for payment in lieu of notice and the 22 days worked pay.
33. As regards leave pay counsel argued that since the Claimant was in the employment of the Respondent for less than a year, he is entitled to only Kshs. 181,730.77 a prorated amount for 6 months worked.
34. It was further argued that under section 49 [4] the compensatory relief sought cannot be granted since it is the Claimant who by his poor performance induced the termination.

Admitted part of the Claim

35. By the witness statement of its Finance and Administrative manager, Francis Muthiani, and counsel's submissions, the Respondent made a partial admission of the Claimant's claim, thus entitlement to the notice pay of 3 months' salary, and salary for the twenty-two days worked in the month of August 2019.
36. Consequently, judgment is entered on admission for Kshs. 1,350,000 and 330,000 under those two heads respectively.

Issues for determination

37. I now turn to the issues that commend themselves for determination on the remaining part of the Claimant's claim. The following issues emerge: -
 - a) Whether the termination of the Claimant's employment was fair.
 - b) Whether the Claimant's is entitled to the unadmitted reliefs.
 - c) Who should bear the costs of this suit?

Determination

Whether the termination was fair

38. There is no contention that the Claimant was an employee of the Respondent and that his employment was terminated on the 22nd August 2019; the termination letter did expressly put forth the reason for dismissal as poor performance.
39. In determining whether or not a termination for an employee's employment or a summary dismissal of an employee was fair, two aspects must be considered. Presence or otherwise of procedural fairness and substantive justification. Absence of any of these two automatically renders the termination or dismissal unfair.
40. Section 41 of the Employment 2007 provides for a mandatory procedure that must be adhered to whenever an employer contemplates to determine an employee's employment inter alia on account of poor performance. Too the steps that must guide the employer up to the time of effecting the



contemplation. A fair procedure entails, notification – the employer notifies the employee of the intention and the grounds upon which the action to determine the employment shall be based on; hearing – allowing the employee to make representations on the grounds, and consideration – the employer making a determination by considering the employee’s representations.

41. No doubt this statutory procedure was not adhered to. In fact, the counsel for the Respondent confirmed this when he submitted that it was not necessary that the Claimant be heard since he was summarily dismissed. I must point out that, this line for submission ignores the fact that the termination was on account of poor performance, not on any allegation of gross misconduct, and the provisions of section 41 [2] of the *Employment Act*, which provides that even in situations where the employer is summarily dismissing an employee, the employer shall hear and consider representation from the employee and or his co-worker.
42. By reason of the premises foregoing, I come to an inevitable conclusion that the termination was procedurally unfair.
43. Section 45 of the Act provides:

“No employer shall terminate the employment of an employee unfairly.

- (2) A termination is unfair if the employer fails to prove –
 - a) That the reason for termination is valid.
 - b) That the reason for the termination is a fair reason –
 - (i) is related to the employee’s conduct, capacity and compatibility; or
 - (ii) based on the operational requirements of the employer.

44. Section 45 [5] cloths the Court with the authority to determine whether an employer’s decision was just and equitable.
45. It is not in dispute that the Claimant’s employment was terminated on what the Respondent termed as poor performance. Without much ado, I state that where an employer is alleging that the reason for termination of an employee’s employment was poor performance of the employee, it is now trite law that the employee must establish a couple of things. In the defaulting, the termination shall be deemed unfair. The requirement is in line with the burdens that the employer is expected to discharge under section 43 and 45 of the Act. In the case of *Peter Kamau Mwaura and another vs. National Bank of Kenya* Justice Makau citing *Jane Samba Mukala vs. Ole Tukai Lodge Limited* [2010] KLR 225 observed: -

“Where poor performance is shown to be a reason for termination, the employee is placed at a higher level of proof as buttressed under section 8 of the *Employment Act* to show that in arriving at this decision of noting poor performance of an employee they had put in place an employment policy or practice on how to measure good performance as against poor performance. Section 5 [8] [c] further outlines the policy and practice guidelines that include a performance evaluation system that can be used by an employer in ensuring their employees get a fair chance when they are of poor performance.



46. There is nothing in the material placed before this Court, to suggest that the Respondent did undertake what was required of him as brought out in the holding herein above, before deciding to terminate the Claimant on the alleged account of poor performance.
47. By reason of these premises, I hold that the termination was substantively unfair.

Of the reliefs

48. Having determined as I have that the termination was procedurally and substantively unfair, and considering the circumstances on how the termination occurred, which can easily pass for an unfair labour practice, the substantial deviation by the Respondent from what the law expected of the it, the fact that the Claimant did not contribute to the termination, and the length of time [eight months] that the Claimant was in the Respondent's employment, I am persuaded to grant the Claimant the compensatory relief contemplated under section 49 [1] [c] of the employment act, and to the extent of two [2] months' gross salary.
49. The Respondent contended and its counsel submitted that, it used to make remittances for the Claimant to the National social Security Fund, and therefore by dint of section 35 of the Employment Act, the Claimant is barred from laying a claim for service pay. I have considered the documents that the Respondent placed before this Court, none of them speaks to the alleged remittances. I find no difficult consequently, in finding that the Respondent did not prove the assertion. The Claimant is consequently right in claiming for service pay. I award a prorated service pay for the 8 [eight] months, therefore, Kshs. 150,000.
50. Contrary to the submissions by counsel for the Respondent, I find no bar under section 28 of the Employment against an employee who has not completed a calendar year from claiming for a prorated annual leave pay. The submission is based on a narrow interpretation of the provision, with due respect. However, it is imperative to note that the Respondent's counsel in same submissions concedes that the Claimant is entitled to the pay to an extent of Kshs. 181,730.77.
51. Lastly, on the claim for house allowance, I have not been persuaded that the salary of Kshs. 450,000 was exclusive of house allowance. I agree with the Respondent that the sum was a consolidated sum. I therefore decline to grant the relief.
52. In the upshot, Judgment is hereby entered in favour of the Claimant in the following terms: -
- a) A declaration that the termination was unfair.
 - b) 3 months' salary in lieu of notice, Kshs. 1,350,000.
 - c) Unpaid salary for the 22 days, Kshs. 181,730.77.
 - d) Compensation pursuant to the provisions of section 49 [1] [c], Kshs. 900,000 of the Employment Act.
 - e) Service pay, Kshs. 150,000.
 - f) Interest on [b], [c], [d], [e] and [f] at Court rates from the date of this Judgment till full payment.
 - g) Costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF APRIL, 2022.



OCHARO KEBIRA

JUDGE

Delivered in presence of:

Mr. Mungama the for Claimant.

Mr. Mali for the Respondent.

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 15th March 2020 and subsequent directions of 21st 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

