



**TIC v Telkom Kenya Limited (Cause 2200 of 2016)
[2022] KEELRC 1175 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1175 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2200 OF 2016**

SC RUTTO, J

MAY 27, 2022

BETWEEN

TIC CLAIMANT

AND

TELKOM KENYA LIMITED RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent as a watchman vide a letter dated August 6, 1992. He avers that during the period of employment, he performed his duties with diligence, enthusiasm, resourcefulness, reliability and honesty. That he fell ill on or about June, 2006 and was admitted in hospital on Augusts 2, 2006. That he was subsequently diagnosed with schizoaffective illness at the Kenyatta National Hospital and later referred to Mathare Mental Hospital.
2. That it was during his hospitalisation at Mathare Mental Hospital that the respondent served him with a letter of dismissal. He has termed his dismissal as unlawful and thus prays for compensation in the sum of Kshs 1,21,794/=, being compensatory damages, unpaid leave, severance pay, rest days and public holidays not taken.
3. The respondent opposed the claim and states that the claimant was suspended on March 7, 2006 having been involved in siphoning of engine fuel at its Gigiri Exchange. The respondent further averred that it was not aware of the claimant's illness and subsequent hospitalisation. It stated that the claimant was lawfully terminated pursuant to the repealed *Employment Act*, (Cap 226) which was applicable at the time.
4. The matter proceeded for hearing on October 14, 2021 and both parties presented oral evidence.



Claimant's case

5. The claimant testified in support of his case, and at the outset, sought to rely on his witness statement and bundle of documents, which were adopted to constitute part of his evidence in chief. This was with the exception of the medical documents.
6. The claimant testified that he was terminated on August 12, 2006 and was not informed of the reasons for his termination. He denied the allegations of theft presented against him by the respondent. That he did not attend any disciplinary hearing prior to his termination. He admitted writing a statement before the respondent's investigation branch but denied being issued with any document that supported the allegations against him. It was his further testimony that there was no criminal charge brought against him on account of the alleged theft. The claimant further testified that he was depressed and hospitalised at Mathare Mental Hospital at the time. That it was his brother who brought him the letter of termination while he was still admitted at Mathare Mental Hospital. He considered his termination as unprocedural thus asked the Court to allow his claim as prayed.
7. Upon cross examination, the claimant admitted being paid one month's salary in lieu of notice and admitted that he did not complain upon receipt of his terminal dues. He further stated in cross examination that his employer knew that he was unwell.

Respondent's case

8. The respondent presented oral evidence through Ms. Rose Muraguri who testified as RW1. She identified herself as the employee relations specialist in the respondent organization. She also relied on her witness statements and bundle of documents filed on behalf of the respondent to constitute part of her evidence in chief.
9. RW1 testified that the respondent was not aware of the claimant's mental health condition. That the claimant was suspended from duty in line with the respondent's Human Resource Policy and later terminated pursuant to the *Employment Act*, which was in force at the time. That the claimant was informed that he was to be placed on half salary during his period of suspension.
10. It was RW1's further testimony that the claimant had been charged with siphoning of fuel and was asked to respond to the allegations levelled against him, which he did. That a physical hearing was not mandatory. That in effecting the claimant's termination, the respondent followed the procedure applicable at the time. That the claimant did not lose any benefits upon termination and was even compensated for his outstanding leave days. That although he had a right of appeal, he did not exercise the same and did not lodge any complaint upon being paid his terminal dues. RW1 told Court that the claimant was not entitled to any payment stipulated in his claim.
11. Upon cross examination, RW1 stated that the reasons for the claimant's termination were not stated in his letter of dismissal as there was no legal requirement to that effect.

Submissions

12. It was submitted on behalf of the claimant, that there were no disciplinary proceedings conducted by the respondent following the allegations that he had siphoned fuel. The claimant placed reliance on the case of *Sotik Highlands Tea Estates Limited vs Kenya Plantation and Agricultural Workers Union* (2017) eKLR and *George M. Kingaruy vs Next Generation Communications Limited* (2014) eKLR. The claimant further relied on the provisions of sections 41,43 and 45 of the *Employment Act*, 2007.



13. The respondent submitted that the claim is time barred as the claimant ought to have filed the same within 6 years. That he was aware of his termination hence was aware of the cause of action. That as such, he did not fall within the exceptions of section 30(3) of the *Limitations of Actions Act* as he had not demonstrated the factors that prevented him from taking action. The respondent urged the Court to reject the leave granted to the claimant to bring the instant suit. On this score, the respondent invited the Court to consider the findings in several authorities including; *Tana & Athi Development Authority vs Joseph Mbindyo & 3 others* (2013) eKLR and *Mary Wambui Kabugu vs KBS Ltd* C.A No. 195 of 1995 (1997) eKLR. The respondent further urged that the claimant cannot rely on the provisions of sections 41,43 and 45 of the *Employment Act* as the same are not relevant to the claim herein.

Analysis and Determination

14. Flowing from the pleadings, the evidence on record and the rival submissions, it is evident that this Court is being called to determine the following issues;
- i. Whether the leave obtained by the claimant is valid?
 - ii. Whether the claimant's termination was unfair and unlawful?
 - iii. What reliefs if any, avail to the claimant?

Whether the leave obtained by the claimant is valid?

15. The respondent has challenged the leave obtained by the claimant, to institute the claim herein outside the limitation period. From the record, it is evident that the claimant filed a miscellaneous application through which he sought to extend time for filing the instant suit. The Application was considered and allowed on grounds that since the accrual of the cause of action, he had been suffering from a disabling disease rendering him incapacitated and therefore incapable of bringing his claim in time.
16. The respondent has challenged the leave obtained by the claimant on grounds that he was aware of the cause of action.
17. In allowing the Application, the Court noted as follows in its Ruling: -

“The Applicant in the case now before the Court has produced medical reports showing that he has had a long term schizoaffective illness. A medical board sitting at Spinal Injury Hospital on January 8, 2009 came to the following conclusion on the Applicant:

“He gets symptoms of mental condition with or without medication. This is chronic condition that will required medicate (sic) for a long period of time. We therefore recommend retirement on medical grounds”

The Applicant also produced a long term prescription issued to him at Mathari(sic) Hospital on 8th November 2010. Further, a note issued by Dr. P.W. Anduuru on 31st March 2016 confirms that the Applicant was admitted at Avenue Hospital in August 2015 suffering from Major Depressive Disorder

From these medical records, it is evident that the Applicant has, since the accrual of the cause of action herein, been suffering from a disabling disease, rendering him incapacitated and therefore incapable of bringing his claim in time. Consequently, the Court finds that time did not begin to run against the Applicant until August 2015 when he was discharged from confinement at Avenue Hospital”.



18. From the findings above, it is apparent that upon consideration of the medical evidence presented before it, the Court determined that the claimant was suffering from a disabling disease. That evidence in the form of medical reports, is not before the Court today and as such, it is not possible to evaluate the same and determine whether the claimant was so infirm mentally, as to be cognizant of the cause of action.
19. In light of the above, the Court will not interfere with the leave obtained by the claimant and I will proceed to consider the claim on its merit having heard both parties.

Whether the claimant's termination was unfair and unlawful?

20. It is notable that the cause of action arose in 2006 before the enactment of the *Employment Act, 2007*. In this regard, the applicable law in the resolution of this matter, is the repealed *Employment Act*, (Cap 226).
21. The claimant's employment was terminated through a letter dated August 2, 2006 which states as follows;

“Termination of Service

The Management of Telkom Kenya has decided to terminate your services with effect from the date of this letter. You shall be paid one month's salary in lieu of notice as provided in your terms of service with the Company. Please make arrangements to surrender your employment identity card and other Company property and records in your possession to your controlling officer on receipt of this letter. Also liaise with the Pensions and Retirement Section Extelcoms House 4th floor for any dues relevant to you.

Acknowledge receipt of this letter by date and signature on the associated copy”.

22. Evidently, the claimant was terminated upon being issued with one month's salary in lieu of notice. The claimant has challenged his termination on the basis that he was not given any reasons for the same.
23. The claimant's letter of appointment has not provided for the notice period in the event of termination of the employment contract and in this case, regard would have to be made of the *Employment Act* (Cap 226) (repealed Act). Section 14(5) (iii) of the repealed Act is relevant herein and provides as follows: -

“Every contract of service not being a contract to perform some specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya be deemed to be: -

(iii) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty - eight days next following the giving of notice in writing.”

24. In line with above provision, the claimant was entitled to be given at least 28 days' notice. He was given one month notice, which is more or less, equivalent to 28 days.
25. According to the repealed Act, once the terms are complied with, then the employer is not bound to give reasons for the termination and it would be wrong to say that the respondent did not give the claimant reasons and therefore the termination was unlawful. Notably, this position is different from the one stipulated under sections 43 and 45 of the *Employment Act, 2007*.



26. Further, the claimant has stated that he was not subjected to any disciplinary hearing prior to termination.
27. From the record, the claimant was suspended from duty on allegations of siphoning of fuel. Thereafter, he was given an opportunity to respond to the allegations vide a letter dated June 13, 2006. He also admitted writing a statement before the respondent's investigation branch. His termination was preceded by a damning report from the Chief Human Resource Officer and through which termination was recommended.
28. Contrary to the claimant's assertions, there was no provision for a hearing under the repealed Act. Therefore, the respondent was not under any obligation to subject him to a hearing, as required under section 41 of the *Employment Act*, 2007, which is not applicable herein.
29. The total sum of the foregoing is that the claimant's termination by paying one month's salary in lieu of notice was fair enough.
30. To this end, the Court finds that the respondent having terminated the claimant in accordance with the repealed *Employment Act*, which was in force at the time, did so lawfully and the said termination cannot be termed as unlawful and unfair.

Orders

31. In the final analysis, I find that the claimant's termination was neither unfair nor unlawful, hence I dismiss the claim in its entirety and make no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Musungu

For the Respondent Ms. Mbaabu

Court Assistant Barille Sora

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 had 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 Civil 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.

STELLA RUTTO

JUDGE

