



**Kamau v Kiambu Golf Club (Cause 2185 of 2017)
[2022] KEELRC 1689 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1689 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2185 OF 2017**

JK GAKERI, J

MAY 25, 2022

BETWEEN

PAUL KAMAU CLAIMANT

AND

KIAMBU GOLF CLUB RESPONDENT

JUDGMENT

1. The claimant commenced this suit by a memorandum of claim dated November 2, 2017 and filed on the same date alleging that he was unlawfully dismissed and the Respondent did not pay terminal dues.
2. The claimant prays for –
 - a. A declaration that the termination of employment was unlawful
 - b. General damages for unlawful termination.
 - c. Kshs.294,968.70/= plus interest at court rates from the date of filing this suit until payment in full comprising:
 - i. One month's pay in lieu of notice Kshs.10,497.00
 - ii. Maximum compensation (12 months) Kshs.125,964.00
 - iii. Unpaid salary for September 2016 Kshs.10,497.00
 - iv. Leave days not taken
x 10,497 x 3) Kshs.22,043.70
 - v. House allowances
x 10,497 x 12 x 3) Kshs.125,964.00



- d. Costs and incidental to this suit.
3. The Claimant's case is pleaded as follows:
4. The Claimant was employed by the Respondent in May 2014 as a waiter at a monthly salary of Kshs.10,497/= and performed his duties with zeal, utmost loyalty and dedication until September 2016 when he was unfairly terminated from employment without an opportunity to be heard.

Respondent's Case

5. The Respondent filed a defence to the memorandum of claim on December 20, 2017 denying the Claimant's allegations. It avers that the Claimant failed to discharge his duties with utmost loyalty and dedication and was issued with several warning letters but did not improve. That he had been found drunk while on duty or would report to work late.
6. It is the Respondent's case that the Claimant's employment was terminated for acts of gross misconduct, having stolen and sold club car stickers to strangers hereby comprising security of members and was therefore lawfully terminated from employment.
7. The Respondent prays for dismissal of the suit with costs.
8. The Claimant filed a response to the Respondent's statement of defence reiterating the contents of the memorandum of claim.
9. Despite efforts by the Court to have the matter resolved through mediation by appointment of a mediator on March 27, 2019, notifying the parties and notices of mention dated March 27, 2019 and 19th November 2019, none of the parties showed interest in the suit until a notice to show cause why the suit should not be dismissed for want of prosecution was issued on October 7, 2021.

Claimant's Evidence

10. On cross examination, the Claimant confirmed that he received about three or four warning letters from the Respondent's management.
11. Regarding the alleged theft of stickers, the witness confirmed that he admitted the accusation and apologised. It was his testimony that he often reported to work late but not drunk.
12. Further, the witness confirmed that he did not take leave in 2014 and 2015, and his basic pay did not include house allowance.
13. On re-examination, the witness confirmed that the stickers were not for sale and that he was only late by a few minutes.

Respondent's Evidence

14. RW1 testified that he joined the Respondent on October 7, 2020 and did not meet the Claimant. The witness confirmed that the Respondent had a policy on the issuance of stickers.
15. It was RW1's evidence that although the Claimant was called upon to explain the alleged theft of stickers, he provided no evidence of an invitation to the meeting or minutes of the proceedings.

Claimant's Submissions

16. As regards the reliefs sought, the Claimant submits that it is entitled to pay in lieu of notice because he was told to go home on 5th September 2016 to await a call from management.



17. It is further submitted that it was for the Respondent to prove that it paid the Claimant's salary for September 2016.
18. It is also submitted that since the Claimant did not proceed on leave for two years, he was entitled to payment for the days.
19. Finally, it is urged that the Claimant is entitled to house allowance as his salary had no housing allowance.
20. Reliance is made on Section 45 of the Employment Act to urge that the Claimant's employment was unfairly terminated as he was not given a hearing.
21. The decision in Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR is relied upon to reinforce the submission that the procedure envisioned by section 41 of the Employment Act, 2007 was not followed.

Respondent's Submissions

22. The Respondent rehashes RW1's evidence to urge that the theft of a car sticker from the Manager's office and sale to a stranger warranted summary dismissal under section 44(4)(b) and (g) of the Employment Act. That the Claimant had previously been warned about reporting to work late, while drunk and failing to obey commands from his superiors and had been placed on suspension.
23. It is the respondent's submission that termination of the claimant's employment took place on September 4, 2016 as stated in dismissal letter dated September 5, 2016.
24. That the respondent acted in consonance with the law as the theft and sale of the respondent's sticker to a stranger was risky to the property of the respondent and its members being a strictly members' club. The decision in Thomas Sila Nzivo v Bamburi Cement Limited [2014] eKLR is relied upon to urge that the Respondent's action was justifiable under section 44(4)(g) of the Employment Act, 2007.
25. It is further submitted that the Claimant admitted having stolen the car sticker.
26. The decision in George Okello Munyolo v Unilever Kenya Limited [2019] eKLR is also relied upon.

Analysis and Determination

27. The issues that commend themselves for determination are whether: -
 - a. The Claimant's summary dismissal was fair and/or lawful;
 - b. The Claimant is entitled to the reliefs sought.
28. On the first issue, there is no contest that the claimant was employed by the respondent by a written contract dated June 2, 2014, with effect from June 1, 2014 to August 31, 2014 in the first instance at Kshs.9,000/= per month. This was in pursuance to an application dated April 15, 2014. The agreement was renewable subject to sales of at least Kshs.130,000/=.
29. In addition, the agreement provided for confidentiality, honesty and trustworthiness. Drunkenness, unhygienic tendencies and unbecoming behaviour would not be condoned.
30. A copy of a payslip for August 2015 shows that by then the Claimant's basic salary had risen to Kshs.10,497.00 per month excluding allowances such as overtime.
31. The employment agreement made no reference to house allowance and the payslip on record has no such entry.



32. The Claimant's unenviable journey to dismissal from employment is rather comical and unfolded as follows:
33. By letter dated June 2014, the Claimant apologises for an undisclosed mistake he had made, seeks forgiveness and promises that it would not happen again. The apology was accepted on August 10, 2015 with a remark as follows "Accepted and given last chance, if happens again will be dismissed."
34. Second, by letter dated July 27, 2015, the Claimant was suspended for an unspecified period for having refused to obey instructions to clean the club house. An explanation was demanded.
35. Third, by a letter dated December 19, 2015, the Claimant explains to the Club Manager why he reported to work late at 2.50 pm and apologises. The letter further states that on December 18, 2015 one Mr. John Waithaka had given them vodka at the workplace.
36. A second similar letter dated on even date is incomplete and has the following words "Suspended for one week with effect from December 19, 2015 at 4.06 pm".
37. At the bottom of the letter the following words are inserted "You did not inform me about your coming on duty late. So these are lies and for not talking the truth ..."
38. Fourth, the claimant's performance appraisal for the period September 30, 2014 to September 30, 2015 dated October 12, 2015 rates him as meeting job requirements. Additional comments by the club member or supervisor states as follows "He need to improve a lot". The overall comment by the supervisor is "Needs to improve attendance."
39. Fifth, in an undated letter, the claimant is explaining a mistake he had made in relation to a customer's bill of Kshs.110/=.
40. A comment at the bottom of the letter states a follows: "Last Warning: pliz take a note". Dated March 10, 2016. A copy of the alleged bill dated 8th March 2016 is attached as well as the customer's statement. Apparently, the claimant had written a bill for items already paid for by the customer, Mr. Samuel N. Mutua Thuku.
41. Sixth, by a letter dated September 3, 2016, the Claimant apologises for a mistake he had made the week before of giving out a car sticker without the Manager's permission and seeks forgiveness.
42. A letter of termination of employment dated September 5, 2016 follows.
43. As to whether the Claimant's dismissal on September 4, 2016 was fair and/or unlawful, the Court is guided by the provisions of the *Employment Act* 2007, specifically sections 41 on the procedure to be complied with, 43 and 45 on the burden of proof, 44 on summary dismissal and 47(5) on justification of the termination.
44. A summary of some of these provisions was captured by the Court of Appeal in its decision in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR as follows–

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employees in matter of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (Section 47(5)), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”



45. The Court is bound by these sentiments.
46. As courts have elaborated in innumerable decisions, for a summary dismissal or termination of employment to pass muster, it must not only be substantively justifiable but must in addition have been conducted in accordance with a fair procedure. In other words, it must pass the substantive justification and procedural fairness test. See *Naima Khamis v Oxford University Press [EA] Ltd* [2017] eKLR as well as *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR.

Reason for Termination

47. According to the termination letter on record which the Claimant did not contest, the reason for termination of employment on 4th September 2016 was the Claimant's involvement in the theft of a car sticker or pass which the Claimant sold to a stranger who was then arrested by guards at the club on August 27, 2016 at 1.15 am while entering the club disguised as member. The matter was reported to the police Ref. OB No. 51/27/8/2016.
48. The Claimant did not deny the contents of the termination letter and had apologised for having taken the sticker from the Manager's office without permission. The Claimant did not submit on this issue.
49. The court is in agreement with the Respondent's submission that the theft of the sticker from the Manager's office amounted to gross misconduct and warranted summary dismissal in consonance with the provisions of section 44(4)(g) of the *Employment Act* that:
 - (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.
50. The Court is also guided by the decision in *Thomas Sila Nzivo v Bamburi Cement Limited* (supra) relied upon by the Respondent where the Court stated as follows:

“The respondent had reasonable and sufficient grounds to suspect the claimant of having acted to the substantial detriment of the respondent and its property, and was justified in summarily dismissing the claimant under section 44(4)(g) of the *Employment Act* 2007. The Employer was not required to have conclusive proof of the claimant's involvement; it was only expected to have reasonable and sufficient grounds.”

51. The court is in agreement with these sentiments.
52. In the instant case, the Claimant admitted that he stole a car sticker or pass and sold it to a third party.
53. In the premises, it is the finding of the Court that the Respondent has on a balance of probabilities established that it had a valid and fair reason to summarily dismiss the Claimant from employment.

Procedure

54. Needless to emphasise, for termination of employment or summary dismissal to pass muster, it must pass the procedural fairness test. The specific attributes of the procedure are set out in section 41 of the *Employment Act* and have been elaborated upon in legions of decisions including *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR where the Court of Appeal itemised the specific steps to be complied with.



55. In the instant case, it is common ground that the Claimant was not taken through any disciplinary process. RW1 confirmed in cross examination that there was neither an invitation for a hearing nor minutes of the proceedings.
56. As emphasised by the Court of Appeal in its decision in *Pius Machafu Isindu v Lavington Security Guards Limited* (supra), Section 41 of the *Employment Act* sets up a mandatory and elaborate process to be complied with.
57. There is no gainsaying that the claimant was not accorded the procedural safeguards prescribed by section 41 of the *Employment Act*, 2007.
58. Accordingly, it is the finding of the Court that the Claimant's summary dismissal by the Respondent was procedurally flawed for noncompliance with the provisions of Section 41 of the Act and thus procedurally unfair.

Reliefs

59. As regards the reliefs sought, the Court proceeds as follows:

a. A declaration that the termination of employment was unlawful

60. Having found that the summary dismissal of the Claimant from employment was unfair for procedural impropriety, a declaration to that effect is hereby issued.

b. General damages for unlawful termination

61. The Claimant led no evidence and made no case for the award of damages for unlawful termination. More significantly, the *Employment Act*, 2007 does not recognise the remedy of general damages for unlawful or unfair termination of employment. The prayer is dismissed.

c. Sum of Kshs.294,968.70

- i. Pay in lieu of notice

62. Although the Claimant submitted that he was told to go home to await a call by management, he led no evidence of when this took place and who gave the instructions. Instructively, the pleadings have no dates of the alleged activity. In addition, the Claimant was summarily dismissed. Notice was not a requirement. The claim is dismissed.

- ii. Unpaid salary for September 2016

63. The Claimant led no evidence of when he left the place of employment and when he returned to ascertain that there was no work for him. Relatedly, the Respondent led no evidence that it paid for the four days in September 2016. Claimant is awarded four days salary Kshs.1,400/=.

- iii. Leave days not taken

64. The Respondent did not contest the days claimed by the Claimant or tender evidence that he had proceeded on leave. The Claimant served for about two years and three months, not three years as indicated by the computations.

65. Granted that leave is a statutory right by dint of section 28 of the *Employment Act*, the same is awarded for two years and three months Kshs.16,532.80.

- iv. House allowance



66. Analogous to leave allowance, house allowance is a statutory right by virtue of section 31 of the *Employment Act*. The employer is required to provide housing or pay house allowance to the employee. The employer neither provided housing nor allowance as confirmed by the Claimant. In addition, the payslip on record has no entry for house allowance.
 67. On the quantum of house allowance, the rate of 1/3 relied by the Claimant has neither statutory nor judicial justification.
 68. Noteworthy, the Court of Appeal has authoritatively held that 15% is a reasonable percentage for housing and the same is awarded as follows $15/100 \times 10,497 \times 27 \text{ months} = \text{Kshs.}42,512.85$.
 69. See *Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu* [2019] eKLR.
- v. 12 months' salary compensation for unlawful termination of employment
70. Having found that the Claimant's summary dismissal was procedurally flawed, the Claimant is entitled to the relief provided by section 49(1)(c) of the *Employment Act* provided the parameters ordained by Section 49(4) of the Act are observed. The Court has taken the following into consideration: –From the evidence on record, it is unclear whether the Claimant wished to continue in the employment of the Respondent. The Claimant was an employee of the Respondent for about two years and three months only. The Claimant did not appeal against the decision of the Club Manager. An appeal to the Chairman of Board of Directors of the Club may have yielded a different result. The Claimant admitted on cross examination that he received three or four warning letters from the Respondent's management. This is exceedingly high in two years and three months. Puzzlingly, the Claimant admitted all the alleged mistakes/wrongdoings and apologised in writing.
 71. In the circumstances the court is satisfied that the equivalent of two months' salary is fair, Kshs.20,994/=.
 72. Accordingly, judgment is entered for the claimant against the Respondent for Kshs.81,439.65 with costs.
 73. Interest at court rates from the date of judgment till payment in full.
 74. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH DAY OF MAY 2022

DR. JACOB GAKERI

JUDGE

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 **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.

DR. JACOB GAKERI

JUDGE

