



**Apiyo v J.K Kibicho & Company Advocates (Cause 517 of 2022)  
[2022] KEELRC 1651 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1651 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 517 OF 2022  
AN MWAURE, J  
MAY 19, 2022**

**BETWEEN**

**DORCAS ANYANGO APIYO ..... CLAIMANT**

**AND**

**J.K KIBICHO & COMPANY ADVOCATES ..... RESPONDENT**

**JUDGMENT**

1. The claimant is a former employee of the respondent law firm. She filed the memorandum of claim on the April 1, 2016 claiming unlawful/unfair dismissal from employment as well as the non-payment of terminal dues and compensatory damages.

**The Claim**

2. The claimant was employed by the respondent from June 27, 2002 as a secretary/office administrator with her last salary being Kshs 43,750/= per month. On the November 11, 2015, one Daniel Mwangi, the proprietor of the respondent's company summoned her to his office and instructed her to proceed for compulsory leave upto the November 30, 2015.
3. Upon returning to work on November 30, 2015, the said Daniel Mwangi without any cogent reason informed her that her services were no longer required by the respondent and that she should just go home. The respondent's proprietor went ahead and issued her with a cheque of Kshs 64,167 being payment for her pending leave days not expressly taken while working for the respondent.
4. The claimant says that the respondent's actions of sending her away from work amounted to summary dismissal which clearly offends the provisions of the law, the principles of natural justice and the basic tenets of fair labour practices in that the claimant had done nothing wrong to warrant summary dismissal, no hearing ever took place before the alleged decision to summarily dismiss the claimant was reached, due process was thrown out of the window to summarily dismiss her and the



decision to dismiss her was extremely harsh and unwarranted considering that she diligently served the Respondent for 13 years without blemish.

5. The claimant avers that as a result of the illegal and unfair dismissal she suffered abrupt loss of income and trauma and inability to meet her continuing legal obligations as a result of which she seeks compensation at 12 months gross salary. The respondent prays for;-
  - a. A declaration that the respondent's action to summarily dismiss the claimant from employment was unlawful and unfair.
  - b. A declaration that the claimant is entitled to payment of her terminal dues and compensatory damages as pleaded.
  - c. An order for the respondent to pay the claimant his terminal benefits and compensatory damages totalling to Kshs 568,750/=.
  - d. Interests on (c) above at court rate from the date of filing suit in full.

### **Response**

6. The respondent entered an appearance on April 14, 2016 and filed a response on the May 3, 2016. The respondent avers that the claimant was temporarily assigned the duties of acting office manager but her tenure was marked with rudeness, insubordination and a penchant for altercations with members of staff and clients that caused her to be relieved of her duties.
7. The claimant was granted permission to be of duty from June 24, 2015 to June 29, 2015 to attend a burial and instead of reporting to work on the appointed time that is on the June 29, 2015 she unilaterally and without informing the Managing Partner stayed away from the workplace and even after reporting back on the July 2, 2015 she refused to explain her absence.
8. The claimant whilst positioned as at the front office desk of the respondent firm, she unilaterally without consulting the Managing Partner turned away court process servers in particular a court process server from the High Court Registry who had come to effect service in connection with a suit which the firm was handling in the High Court namely High Court Civil Case No 208 of 2011 where there was a notice to show cause why the suit should not be dismissed for want of prosecution.
9. On the strength of that report, the High Court dismissed the suit which the firm was handling in the High Court namely Civil High Court Case No 208 of 2011 on behalf of the plaintiff without the advocates in the respondent's firm knowing that the High Court process server had been sent away or that the claimant had refused to accept service or that the matter was coming up on the June 13, 2014 for the notice to show cause.
10. The respondent's Managing Partner showed the claimant the notice to show cause and the remarks thereon by the High Court Registry process server and invited her to a meeting on the same day when he requested her to tender an explanation with regard to those events verbally and in writing but the claimant defiantly stated that she would not oblige and that precipitated the sending of the claimant on compulsory leave and asked her to go consider her response.
11. The respondent avers that upon the claimant's return on November 30, 2015 the Managing Partner asked the claimant whether she was now ready to tender an explanation in writing on what happened and the claimant stated she had nothing to write about and the respondent thereafter took the decision to release the claimant from its employment.



12. The respondent says that it informed the claimant that owing to her conduct described in that notice to show cause together with failure to seek assistance from the advocates in the firm or even report the matter or in any way act diligently in that situation and further exacerbated the situation by wilful failure to give an explanation at all on the circumstances that led to her action at the material time that exposed the respondent firm, there was no option but to terminate the services of the claimant. The claimant squandered the opportunity to be heard.

### **Claimant's Case**

13. CW1 Dorcas Anyango Opiyo gave sworn testimony and stated that she used to work for the respondent from June 22, 2002 and until November 11, 2015 as the Secretary and Office Administrator. She says she was told to go and come back on the November 30, 2015. She was given a payment voucher on returning for Kshs 64,167/= for the leave days which she received but rejected the document that stated that it was full and final settlement. The witness adopted the witness statement dated the April 2016 as part of her evidence in Chief and the documents in list of documents as exhibits.
14. The claimant says she did not refuse to receive the show cause letter as she only saw it when it was sent to her advocates. She has never declined to receive any document from the court. She was never given a notice to show cause of any offence she had committed. On November 30, 2015 she was not issued with any letter and was never asked to defend herself.
15. She further says that on November 30, 2015 she was not given any termination letter explaining why she was released from employment. She prays for one month salary in lieu of notice as she was not given any notice. She prayed for 12 months equivalent for the 13 years she had worked for the respondent whereby she had never been disciplined or given a warning. She was never taken through any disciplinary process. She also says she suffered a lot of trauma when she was terminated.
16. Upon cross-examination, she said she rose to the rank of office administrator in 2004. She was not given a document but was given that position by the late J. Kibicho. She says she used to receive and stamp company's letters. She was not known to the courts clerks of the commercial division in their personal capacity.
17. The notice to show cause of May 9, 2014 does not have a stamp of the law firm and there is no indication she refused to accept service as it did not have the office reference number.
18. On the November 11, 2015 there was no hearing or discussion with Mr Mwangi Kibicho. On the November 13, 2015 she was given a letter and a cheque and she first saw the notice to show cause in her advocates office. She did not write to JK Kibicho to ask why she was sent on leave. She never received her final dues except the Kshs 64,167/= being compensation for untaken leave days.

### **Respondent's Case**

19. RW1 Mwangi Kibicho gave sworn testimony and said that he is an advocate in the firm, the Managing Partner, a position he assumed in the year 2010. He adopted the witness statement dated July 10, 2019 and filed on the July 12, 2019. He also adopted the list of documents dated May 3, 2016 as his evidence. The notice to show cause emanates from High Court Commercial Division Case No 208/2011 and was addressed Munyasia & Co and the respondent.
20. It was the duty of the claimant to receive documents for the firm. There is no stamp to show that the notice was received in their office. They got the notice from the court file and later learnt the matter had been dismissed and it is clear from the notice the claimant declined receipt of the same. The respondent said the claimant was diligent but was later complacent when she refused to accept service.



21. The claimant was given an opportunity to explain herself but declined to do so despite him being patient with her. The claimant never wrote to ask why she was sent on compulsory leave. On cross-examination he said that he wrote the letter of dismissal which was not before court. He sent her on compulsory leave on the November 11, 2015 but there was no letter before court. The witness said that the law does require that any charges facing any employee be in writing and the employee is required to respond to the allegations.
22. He has no documentary evidence of the notice to show cause and does not have the name of the person who came to do service of the notice. Service of the notice is like any other service and there is no affidavit of service on record.

### **Claimant's Submissions**

23. The claimant submits that it is not in dispute that the claimant was summarily dismissed by the respondent. The respondent's proprietor confirmed having not given a notice to show cause enumerating the offence committed by the claimant and there was indeed no disciplinary hearing that took place.
24. The name of the person who purportedly did service of the notice is not disclosed. There is no affidavit of service on oath to prove any service and as such the document lacks any probative value. And in any event the document could not form the part and basis upon which the claimant could respond. The claimant contends that the court should consider that the claimant had worked for the respondent for 13 years and note the physical, psychological and emotional hurt while giving the award.
25. The claimant prayed for the 12 months maximum compensation under the *Employment Act* and 1 month salary payment in lieu of notice. The claimant relied on Justice Helen Wasilwa's case in *Eddah A Akumu v AAR Insurance Kenya Limited* where the court awarded 12 months compensation to buttress the contention for the maximum compensation under section 49 (1) of the *Employment Act*.

### **Respondent's Submissions**

26. The respondent submits that the claimant failed to perform her simple task of receiving documents served upon the respondent law firm and declined to offer any explanation or apology orally or in writing. The said action is recognized under section 44(4) (e) of the *Employment Act, 2007* as the action of an employee who fails to obey lawful commands and therefore the respondent did have valid reasons for terminating the claimant.
27. The claimant never wrote at any time to the respondent to enquire why she was being suspended, if at all she was in doubt. The claimant also never wrote to enquire why she was being terminated, if at all she was in doubt. On the date of her termination her conduct was quite telling as she only requested for a recommendation letter. The inexplicable conduct is not what would be expected of a reasonable person who does not know the reason for termination. The claimant did not file any reply to the memorandum of response to deny the respondent's allegations.
28. The Managing Partner Mr Kibicho showed the claimant the notice which showed that she rejected service and the concerned suit was dismissed as a result. The respondent contends that in view of the two opportunities given to the claimant herself the termination was lawful. The respondent relied on the case of *Naftali Ayot v Plywood Kenya Limited* [2017] eKLR for the proposition that the burden of proving that unfair termination or wrongful dismissal has occurred rests on the employee, whilst the burden of justifying those grounds rests with the employer.



29. On the compensation, the respondent submits that the claimant's failure to prove her case on balance of probabilities disentitles her from any compensation and terminal dues. In the alternative, the respondent submits without prejudice relying on the Court of Appeal case in [CMC Aviation Limited v Mohammed Noor](#) [2015] eKLR where the court held despite a finding of unfair termination the fact that the contract was terminable by the giving of one month Notice meant an award of one month salary in lieu of notice was a reasonable compensation.

### Issues For Determination

- a. Whether the termination of the claimant's employment was unlawful/wrongful
- b. The remedies, if any, the claimant is entitled to.

### Determination

30. Section 45 (1) and (2) of the [Employment Act, 2007](#) provides that—

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
  - (a) that the reason for the termination is valid;
  - (b) that the reason for the termination is a fair reason—
    - (i) related to the employee's conduct, capacity or compatibility; or
    - (ii) based on the operational requirements of the employer; and
  - (c) that the employment was terminated in accordance with fair procedure.”

31. Section 47(1) (5) of the [Employment Act, 2007](#) provides that

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

32. In [Naima Khamis v Oxford University Press \(EA\) Limited](#) [2017] eKLR, the Court of Appeal said that –

“On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of section 43(1) of the [Employment Act](#), which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also section 45(2)(c) requires a termination be done according to a fair procedure.”

33. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to



follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required. Section 41 of the *Employment Act* provides that the employer who intends to terminate the employment of an employee must give the employee a chance to explain himself in a language he understands the reason for the termination and this should be in the presence of a fellow worker or a shop floor representative.

34. Similarly, Ndolo, J in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR held that,
- "However, for a termination of employee to pass the fairness test it must be shown there was not only substantive justification but also procedural fairness."
35. The Court of Appeal in *CMC Aviation Limited v Mohammed Noor* [2013] eKLR expressed itself as follows;
- We respectfully agree that 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 the statute, that still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of the employment contract, like where the employer dismisses the employee without notice or without the right amount of notice.
36. The foregoing is an authoritative articulation of the law on termination which binds the court. The provisions of the *Employment Act, 2007* and decisions above mentioned demonstrate the essence of fairness in the process of terminating a contract of employment.
37. From the evidence led in court, it is not in issue that the claimant was summarily dismissed. The claimant says that without any reason or basis she was terminated by the respondent from her work as the office administrator. The respondent witness, RW1, in his evidence cites failure to report back to work on due date after going for leave and to receive notice to show cause from the High Court as the reasons leading to dismissal.
38. The said notice to show cause related to a matter which was slated for the June 13, 2014. The respondent witness says he discovered that the matter was dismissed on the November 11, 2015. This is the same day the claimant was informed to go on compulsory leave of 14 days following of which she was dismissed on the November 30, 2015 after having allegedly failed to provide an explanation on her failure to receive the notice. There is no termination letter or notice tabled by the respondent to substantiate the reasons leading to the dismissal which for the material part are denied by the claimant.
39. At any rate, the notice to show cause which the claimant allegedly declined to receive on behalf of the firm is not accompanied by an affidavit of service by the said High Court process server demonstrating the non-acceptance of service. The court is thus unable to reach a definitive conclusion as to whether the claimant was served but declined service, granted the claimant disputes the account given by the respondent on failure to accept service of the notice.
40. On the failure to return to work on due date after leave, it is unclear why the claimant continued working from the July 2, 2015 upto the November 11, 2015. The issue was not raised until November 30, 2015. There is no document whatsoever showing the respondent considered the issue significant and had contemplated terminating the claimant owing to failure to report back to work as was expected.
41. For the foregoing reasons, the court is satisfied that the respondent has not on balance of probabilities demonstrated that it had a valid and fair reason to terminate the claimant as required by section 45 of



the Employment Act and furthermore there is no evidence that the reasons were well communicated to the claimant and that the claimant was accorded an opportunity to defend herself in the presence of a fellow worker or a floor union representative.

42. On procedural fairness, although the respondent's witness confirmed on exam in chief and cross examination that the claimant was taken through a disciplinary process, no tangible evidence was furnished to show the same took place. The respondent tendered neither notice of invitation of the claimant to the hearing, nor record of the proceedings or minutes. In the absence of any such evidence, the court is satisfied that the claimant has on a balance of probabilities established that she was dismissed without being afforded an opportunity to confront the allegations made against her in the presence of a representative of her choice. The summary dismissal of November 30, 2015 is accordingly procedurally flawed for non-compliance with the provisions of section 41 of the Employment Act, 2007.
43. In view of the foregoing the court finds that the summary dismissal of the claimant was unlawful and wrongful and so declares accordingly.

### **Remedies**

44. The decision to terminate the claimant having been found irregular, the claimant is entitled to compensation under section 49(1) (c) of the Act. In making the award, the court has considered the fact that the claimant had served the respondent for 13 years, had no previous warning and cannot on the facts before court be said to have contributed to the dismissal. In the circumstances, the equivalent of 8 months salary is fair compensation and the same is awarded amounting to Kshs 350000/=.

45. The court also awards the claimant one month salary in lieu of notice given no notice was issued prior to the decision to terminate amounting to Kshs 43,750/=.

The impact of this award is Kshs 393,750/= and interest at court rates from the date of judgement till full payment.

Costs follow the event and so the same are awarded to the claimant.

46. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF MAY, 2022.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

Claimant – absent.

Respondent – absent

### **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 March 15, 2020 and subsequent directions of April 21, 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.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

