



**Karisa v Texas Alarms [K] Ltd (Cause 292 of 2018)
[2022] KEELRC 78 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 78 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 292 OF 2018**

**AK NZEI, J
MAY 19, 2022**

BETWEEN

SAMMY CHARO KARISA CLAIMANT

AND

TEXAS ALARMS [K] LTD RESPONDENT

JUDGMENT

1. The suit before me was instituted by the Claimant on 2nd May 2018 vide a Memorandum of Claim dated 13th April 2018. The Respondent entered appearance on 22nd May 2018 and subsequently filed response to the claim on 29th June 2018.
2. On 3rd July 2018, the Claimant filed an Amended Memorandum of Claim dated the same date (3rd July 2018) and pleaded as follows:-
 - a. that the Claimant was employed by the Respondent as a security guard on casual basis in October 2005 at a monthly salary of ksh.3,800, and was in or about 24th March 2009 employed on permanent basis, earning ksh.11,400 at the time of termination.
 - b. that on or about 16th June 2017, the Claimant was wrongfully and unfairly terminated from employment by the Respondent.
 - c. that the Claimant was never given an opportunity to be heard, was not issued with notice or warning, and neither was he given a valid reason for the termination.
 - d. that the Respondent never remitted the mandatory statutory deductions to the NSSF throughout the period of employment, hence the Claimant claimed service pay at the rate of eighteen (18) days for every year worked from October 2005 to June 2017.
 - e. that the Claimant was never provided with housing accommodation as provided for under paragraph 5 of the Regulations of Wages (Protective Security Services) order 1998, and



therefore claimed housing allowance calculated at 15% of the basic monthly wage for twelve years from January 2005 to July 2017, equivalent to 144 months.

3. The Claimant set out his claim against the Respondent as follows:
 - a. one month salary in lieu of noticeksh.11,400
 - b. house allowance 15/100x11,400x144 monthsksh. 246,240
 - c. gratuity for 12 years (18 days for every year worked).....ksh.94,707.69
 - d. service pay for 12 years (18 days every year worked).....ksh. 94,707.69
 - e. 12 months compensation for unlawful termination ksh.136,800 total ksh. 583,855.38
 - f. Certificate of Service.
 - g. costs of the suit and interest.
4. On 18th January 2019, the Respondent filed a Response to the Amended Memorandum of Claim. The Respondent denied the Claimant's claim and pleaded:-
 - a. that the Claimant was employed by the Respondent as a permanent employee from 1st April 2009 till 21st March 2017 at a gross salary of ksh.12,680 being basic salary of ksh.11,026 and house allowance of ksh. 1,654.
 - b. that the Claimant kept on absconding duty and was warned severally.
 - c. that on 21st March 2017, the Claimant disappeared from office without permission or lawful cause and reappeared on 6th May 2017; and this amounted to gross misconduct under section 44 of the Employment Act, and the Claimant was lawfully terminated.
 - d. that a committee found the Claimant to be in serious violation of the Respondent's company rules and regulations, issued him with a warning letter on 6th May 2017 and dispatched him back to work but the Claimant refused to receive the letter and disappeared.
 - e. that on 16th May 2017, the Claimant was issued with a summary dismissal letter.
 - f. that the Claimant was summarily dismissed under Section 44 of the Employment Act for absconding duty, and that procedure for the dismissal was adhered to.
 - g. that the Claimant's net dues were calculated at ksh.2,687, and the amount was deposited in the Claimant's account on 20th June 2017.
 - h. that the Claimant was not entitled to gratuity as NSSF dues were being remitted and was not entitled to house allowance as he was being paid house allowance.
 - i. that the Claimant was not unlawfully terminated.
5. The Claimant is not shown to have filed any Reply to the Respondent's Amended Response to the Memorandum of Claim.
6. The Claimant filed his witness statement dated 13th April 2018 and a list of documents dated the same date, both of which accompanied the initial Memorandum of Claim. Documents listed by the Claimant included a copy of his bank statement, a promotion letter dated 24th March 2009 and two demand letters dated 7th September 2017 and 7th December 2017 respectively.



7. On 13th June 2019, the Respondent filed a list of witnesses and a list of documents, both dated 17th May 2019. Documents listed by the Respondent included copies of the Claimant's national and job identity cards, summary dismissal letter dated 16th May 2017, warning letter dated 6th May 2017, bank deposit slip for ksh. 2,687 and minutes of a meeting held on 6th May 2017.
8. On 7th October 2021, the Respondent filed a further list of documents dated 5th October 2021, whereon he listed the Claimant's NSSF statement dated 1st October 2021 and covering the period between 1st May 2010 and March 2017.
9. When the suit came up for hearing on 27th October 2021, the Claimant produced the documents listed on his list of documents referred to in paragraph 6 of this judgment, and testified:-
 - a. that he was never given any contract, and that his salary of ksh. 11,400 did not include house allowance, and he was not given housing accommodation.
 - b. that the Claimant was not served with any notice and was not given the reasons for his termination; was not called for any disciplinary proceedings, and was not given any dismissal letter.
 - c. that the Claimant was not paid any terminal dues, but in August 2017, some ksh. 2,600 was deposited into his bank account.
 - d. that the Respondent did not respond to the two demand letters send to it by the Claimant's Union and Advocates, and that both demand letters had no claim for house allowance.
 - e. that the Claimant did not abscond duty, and was on duty on the dates that the Respondent alleged he absconded.
 - f. that no disciplinary meeting took place, and the Claimant was never served with any warning.
 - g. that the dismissal letter said to be dated 16th May 2017 was never given to the Claimant, and he never saw it.
10. Cross examined, the Claimant testified:-
 - a. that he had not exhibited anything to show that he was employed in 2005.
 - b. that the Claimant was suspended from duty by the HR on 28th March 2017 until June when he was verbally told to go and see the HR on 16th June 2017; and was told to return the uniform as there was no work.
 - c. that 28th March 2017 was the Claimant's last working day.
 - d. that the Respondent was not being paid during the period that he was away, and was not called for any disciplinary proceedings.
11. The Respondent called two witnesses, Barnard Odhiambo Aduda (RW-1) and Danson Ogutu Obara (RW-2). RW-1 testified, both in chief and under cross examination:-
 - a. that he was the Respondent's Human Resource Manager.
 - b. that the Claimant was being paid ksh. 12,600, out of which ksh. 1,654 was house allowance.
 - c. that the Respondent's last working day was 28th March 2017 when the Supervisor gave him off, to report back on 28th March 2016; but went back on 6th May 2017 when he was given a warning letter, for which he refused to sign and left.



- d. that the Claimant went back on 16th May 2016 and was given the summary dismissal letter.
 - e. that the hearing on 6th May 2017 was convened when the Claimant went to the Respondent's office, and was not a disciplinary hearing; and there was no formal communication regarding the same.
 - f. that the warning letter was issued after the meeting; and was never received by the Claimant.
 - g. that the summary dismissal letter was written on 16th May 2017 when the Claimant returned uniform; and he refused to receive it.
 - h. that there was no disciplinary hearing before the dismissal.
 - i. that the Claimant's salary was ksh.11,026, and the witness (RW-1) did not have the Claimant's payslip to show that he was paid house allowance.
12. RW-2 adopted his recorded and filed witness statement dated 27th May 2019. He testified that he on 23rd March 2017 permitted the Claimant to be away until 28th March 2017, but he never returned. That when the Claimant telephoned the witness on 6th May 2017, RW-2 told him to go to the office and explain where he had been.
13. Parties did not file a joint statement of agreed issues. In my view, issues that fall for determination are as follows:-
- a. whether termination of the Claimant's employment by the Respondent was unfair.
 - b. whether reliefs sought are deserved.
14. On the first issue, the Respondent pleaded and testified to having been summarily terminated the Claimant's employment. section 41 of the Employment Act sets out mandatory procedural requirements which must be adhered to by any employer contemplating termination of an employee's employment for whatever reason. Section 41 of the Act provides:-
- “(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.”
15. RW-1 testified that there was no disciplinary hearing prior to termination of the Claimant's employment as the meeting held on 6th May 2017 was not a disciplinary hearing and that there had been no formal communication with the Claimant before the meeting.



16. The Respondent did not demonstrate compliance with Section 41 of the *Employment Act* 2007. The Court of Appeal held as follows in the case of *Kenfright [EA] Limited v Benson K Nguti* [2016] eKLR:-

“apart from issuing a proper notice according to the contract (or payment in lieu of notice provided), an employer is duty bound to explain to an employee, in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken....We come to the conclusion and find, in agreement with the trial Judge, that the termination of the Respondent’s contract of service in the circumstances, was unfair, the payment in lieu of notice notwithstanding...”
17. The Court of Appeal further held in the case of *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR that failure by an employer to abide with the procedural requirements of Section 41 of the *Employment Act* or failure to meet the provisions of Section 45 of the *Employment Act* renders termination of an employee’s employment unfair.
18. RW-1 testified that the meeting that took place on 6th May 2017 was not a disciplinary hearing, and was convened after the Claimant went to the Respondent’s office, that there was no formal communication with the Claimant prior to this meeting and that the warning letter dated 6th May 2017 was issued to the Claimant after that meeting of 6th May 2017.
19. The foregoing notwithstanding, it is to be noted that issuance of a warning letter by an employer to and employee is in itself a disciplinary action and is a culmination of any form of disciplinary proceedings that may have preceded it. It was held in the case of *Dr Joseph Maingi Maitiba v Permanent Secretary Ministry of Medical Services & another* [2015] eKLR that once some form of disciplinary action is shown to have taken place against an employee, offences forming the subject matter of the concluded disciplinary process cannot be used against the employee at a future date. An employer cannot, therefore, use warning letters as a basis for terminating an employee’s contract of employment.
20. I find and hold that termination of the Claimant’s employment on 16th May 2017 was unfair as it was done by the Respondent without complying with the mandatory procedural requirements of Section 41 of the *Employment Act* 2007.
21. On the second issue, and having found that termination of the Claimant’s employment was unfair, I award the Claimant six months’ salary as compensation for unfair termination of employment.
22. The claim for one month salary in lieu of notice is also allowed, in view of my finding that termination of the Claimant’s employment was unfair. No notice of termination was shown to have been served on the claimant.
23. The claim for gratuity is declined as termination of the Claimant’s employment did not result from redundancy.
24. The claim for service pay, which the Claimant appeared to abandon at the trial, is disallowed as the Respondent demonstrated that the Claimant was a member of National Social Security Fund (NSSF). Section 35(5) of the *Employment Act* excludes members of NSSF among others, from payment of service pay.
25. On the claim for house allowance, the Claimant testified that he earned a monthly salary of ksh.11, 400, and that this amount did not include house allowance. The Respondent, on the other hand, pleaded and testified that the Claimant earned a monthly salary of ksh. 12,680, ksh. 11,026 being basic salary



and ksh. 1,654 being house allowance. No itemized pay statement was exhibited by either party and no employment contract was produced by either party. The issue of payment and/or non-payment of house allowance thus became a case of the Claimant's word against the Respondent's word.

26. Section 10(7) of the *Employment Act* provides:-

“If in any legal proceedings an employer fails to produce a written contract or the written particulars as prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

27. I accept the Claimant's pleading and evidence that he earned a monthly salary of ksh. 11,400, and that the said amount did not include house allowance.

28. Although the Claimant pleaded and testified that he was employed by the Respondent in the year 2005, a fact which the Respondent denied, the Claimant did not demonstrate, on a balance of probability, that he was, indeed, employed in 2005. The Claimant exhibited a letter of promotion dated 24th March 2009. I will, for purposes of this case, take this date as the Claimant's date of employment. I award the Claimant 15% of his monthly salary (ksh.11,400), which is ksh. 1,710 per month as house allowance. This amount is multiplied by the number of months worked, which is 97 months. (ksh. 1,710 x 97 = ksh. 165,870).

29. The Claimant is entitled to be issued with a Certificate of Service under Section 51(1) of the *Employment Act*.

30. In sum, and having considered submissions filed by Counsel for both parties, judgment is hereby entered in favour of the Claimant against the Respondent as follows:-

- a. Six months being salary as compensation for unfair termination of employment.....ksh. 68,400
- b. One month salary in lieu of noticeksh. 11,400
- c. Unpaid house allowance (ksh. 1,710x97 months).ksh. 165,870

Total ksh. 245,670

31. The Respondent shall issue the Claimant with a Certificate of Service within thirty days of this judgment.

32. The Claimant is awarded costs of this claim and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF MAY 2022

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:



..... for Claimant

..... for Respondent

