



**Ogechi v Kaskazi Beach Hotel (Cause 12 of 2020)  
[2022] KEELRC 1661 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1661 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 12 OF 2020**

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

**BETWEEN**

**DANIEL OGECHI ..... CLAIMANT**

**AND**

**KASKAZI BEACH HOTEL ..... RESPONDENT**

**JUDGMENT**

1. The suit herein was instituted by the Claimant on 27<sup>th</sup> February 2020 vide a Memorandum of Claim dated 26<sup>th</sup> February 2020. The Claimant pleaded:
  - a) that the Claimant was employed by the Respondent as a Marketing Director vide a letter of appointment dated 30<sup>th</sup> October 2018 on a two years contract starting 1<sup>st</sup> November 2018 at a monthly unconsolidated salary of ksh.350,000.
2. The Claimant further pleaded:-
  - a. that upon expiry of six months, the contract of employment could be terminated by either party issuing a two months' notice.
  - b. that by a letter dated 2<sup>nd</sup> July 2019, the Respondent unprocedurally terminated the Claimant's employment without notice.
  - c. that in terminating the Claimant's employment, the Respondent breached and failed both the procedural and substantive test as it failed to give the Claimant an opportunity to defend himself against accusations levelled against him and to investigate and to ascertain the authenticity of allegations made against the Claimant.
  - d. that although it was alleged that the Claimant was engaged in gainful employment with Plaza Beach Hotel, no evidence was presented to the Claimant showing that he was engaged in such employment.



- e. that termination of the Claimant’s employment was unfair, and was in breach of the Claimant’s rights as set out in the Employment Act as the Claimant was not accorded an opportunity to be heard before termination and that the Respondent did not act in accordance with justice and equity.
  - f. that at the time of termination, the Claimant had not been paid for approximately six months and that the Respondent’s Financial Controller computed the Claimant’s outstanding salary at ksh.844,000; which amount remains outstanding, and which the Claimant claims over and above other dues.
3. The Claimant sought the following reliefs:-
- a. a declaration that termination of the Claimant’s employment was unfair, unlawful and wrongful.
  - b. outstanding salary computed by the Financial Controller at ksh.844,000.
  - c. salary for July 2019.....ksh.350,000
  - d. payment in lieu of two months’ notice ..... ksh,700,000
  - e. House allowance for nine months  
(0.5x250,000x9).....ksh.472,500
  - f. compensation for wrongful, illegal and unlawful termination.....  
(12x350,000) Ksh.4,200,000
  - g. Certificate of service.
  - h. costs of the suit.
  - i. interest at Court rates.
  - j. any other relief that the Court may deem just to grant.
4. The Claimant filed a detailed witness statement dated 26<sup>th</sup> February 2021 and a list of documents dated the same date, both of which accompanied the Memorandum of Claim. Documents listed on the Claimant’s list are the Claimant’s letter of appointment dated 30<sup>th</sup> October 2018, letter of summary dismissal dated 2<sup>nd</sup> July 2019, computation of salary arrears by the Respondent’s Financial Controller dated 3<sup>rd</sup> July 2019 and a demand notice dated 11<sup>th</sup> December 2019. Copies of the listed documents were filed together with claim documents.
5. The Respondent entered appearance on 20<sup>th</sup> March 2020 and subsequently filed Reply to the Memorandum of Claim on 11<sup>th</sup> May 2021 pursuant to leave granted in that regard. The Respondent denied the Claimant’s claim and further pleaded:-
- a. that the Claimant was rightfully terminated in accordance with the law after the Respondent reached an informed decision that the Claimant had fundamentally breached his employment contract by disclosing confidential information and trade secrets to a rival entity by the name Plaza Beach Hotel.
  - b. that the Claimant was negligent and reckless in the performance of his duties under the contract, leading to substandard quality of service.



- c. that the Claimant was invited for a disciplinary hearing and was given an opportunity to defend himself and to bring a witness, but he did not take up the option.
  - d. that the Claimant was summarily dismissed on grounds of gross misconduct and breach of trust, which decision was communicated to the Claimant through the termination letter dated 2<sup>nd</sup> July 2019.
  - e. that in terminating the Claimant's employment, the Respondent observed procedures stipulated in the *Employment Act*.
6. On 13<sup>th</sup> July 2021, the Claimant filed Reply to the Respondent's Response to the Memorandum of Claim.
  7. The Respondent is not shown to have filed either a witness statement or a list of documents despite having been ordered to do so.
  8. When the suit came up for hearing on 18<sup>th</sup> January 2022, only the Claimant attended Court, and being satisfied that a hearing notice had been served on the Respondent's Advocate on record on 25<sup>th</sup> November 2021 and an affidavit of service duly filed in Court on 17<sup>th</sup> January 2021, I allowed the hearing to proceed.
  9. The Claimant adopted his filed witness statement dated 26<sup>th</sup> February 2020 as his sworn testimony and produced the documents referred to in paragraph 4 of this judgment.
  10. The Claimant further testified that under his letter of appointment dated 30<sup>th</sup> October 2018, the Claimant's ksh.350,000 salary was exclusive of house allowance, and that under Clause 12 of the letter of appointment, he was supposed to be given two months' notice in case of termination. It was the Claimant's further evidence that before being given the letter of summary dismissal dated 2<sup>nd</sup> July 2019, he was not given a notice to show cause, was not taken through any disciplinary proceedings and was not given any opportunity to defend himself. That he was only given the dismissal letter.
  11. The Claimant testified that he was not paid all his salary for six months and that upon being given the summary dismissal letter, he was told to go to the accountant's office for computation of his terminal dues. That the Claimant's unpaid salary arrears were computed at ksh.844,000, which amount has not been paid to date.
  12. It was the Claimant's testimony that he was never issued with any payslip as the Respondent used to pay the Claimant's salary into the Claimant's bank account. That the Claimant worked from 1<sup>st</sup> November 2018 to 2<sup>nd</sup> July 2019.
  13. The Claimant prayed for judgment as set out in his Memorandum of Claim; and closed his case.
  14. There being no appearance on the part of the Respondent, the Respondent's case was marked as closed, and the Claimant was ordered to file and to serve written submissions. The suit was fixed for mention on 27<sup>th</sup> January 2022 to fix a date for judgment.
  15. On 27<sup>th</sup> January 2022, the suit was fixed for judgment on 19<sup>th</sup> May 2022, but not before confirming service on the Respondent's Advocate on record of both the Claimant's written submissions and a Mention notice. There is on record an affidavit of service filed on 28<sup>th</sup> January 2022.
  16. The evidence presented by the Claimant was neither controverted nor rebutted as the Respondent did not participate in the trial. The Respondent's Reply to the Memorandum of Claim was never



prosecuted by presentation of evidence by the Respondent, and therefore remained just a paper on the Court's record.

17. In my view, issues for determination in this case are as follows:-
  - a. whether termination of the Claimant's employment by the Respondent was unfair.
  - b. whether reliefs sought by the Claimant are deserved.
18. On the first issue, Section 41 of the *Employment Act* sets out mandatory procedural requirements which every employer contemplating termination of an employee's employment must comply with. 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.”
19. The Claimant testified that he was not given notice of the intended termination, he was not given an opportunity to defend himself against the accusations levelled against him and that the Respondent never investigated such accusations and never established their authenticity and justification. That termination of his employment was unlawful and unfair.
20. In the case of *Kenfright [EA] Limited v Benson K Nguti* [2016] eKLR, the Court of Appeal held as follows:-

“apart from issuing a proper notice according to the contract (or payment in lieu of notice as 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 termination of the Respondent's contract of service in the circumstances, was unfair, the payment in lieu of notice notwithstanding...”
21. The Respondent in the present case was not shown to have complied with Section 41 of the *Employment Act* before summarily terminating the Claimant's contract of employment on 2<sup>nd</sup> July 2019. The Court of Appeal in the case of *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR further held that failure to comply with the mandatory procedural requirements of Section 41 of the *Employment Act* renders termination of an employee's employment unfair.
22. Failure by the Respondent to comply with the mandatory procedural requirements of Section 41 of the *Employment Act* rendered termination of the Claimant's employment procedurally unfair. The validity and justification of accusations levelled against the Claimant is not shown to have been proved



and or established, rendering the termination of the Claimant's employment substantively unfair. I find, hold and declare that termination of the Claimant's employment was unlawful and unfair.

23. The Claimant demonstrated that the Respondent breached Clause 12 of the contract of employment by failing to issue the Claimant with two months' notice prior to terminating the Claimant's employment. This rendered the termination wrongful.
24. On the second issue, and having already found and declared that termination of the Claimant's employment was unfair, unlawful and wrongful, and taking into account the circumstances in which the Claimant's employment was terminated, I award the Claimant six months salary as compensation for unfair and wrongful termination of employment. That is ksh.350,000x6 =2,100,000.
25. On the claim for outstanding salary arrears, the Claimant testified and demonstrated that these were on 3<sup>rd</sup> July 2019 computed by the Respondent's Financial Controller at ksh.844,000. The Claimant produced this computation, duly signed, dated and stamped by the Respondent's Financial Controller, as his exhibit no. 3. This evidence was neither controverted nor rebutted by the Respondent. The claim is allowed.
26. The claim for July 2019 salary is declined. The Claimant's employment was summarily terminated by the Respondent on 2<sup>nd</sup> July 2019. The Claimant produced the letter of summary dismissal dated 2<sup>nd</sup> July 2019, as his exhibit no. 2. He, the Claimant, did not, therefore, work during the month of July 2019; and cannot claim a salary for that month.
27. On the claim for two months' salary in lieu of notice, Clause 12 of the Claimant's contract of employment provided for two months' notice in the event of termination of the contract of employment after the lapse of six months from the date of commencement thereof. The contractual commencement date was 1<sup>st</sup> November 2018, and the Claimant was summarily dismissed on 2<sup>nd</sup> July 2019. The Claimant was thus entitled to two months' notice or payment in lieu thereof. I allow the claim and award the Claimant ksh 700,000 being two months salary in lieu of notice.
28. On the claim for house allowance, during the eight months worked by the Claimant (November 2018 to June 2019), Clause 4(a) of the Claimant's contract of employment provides:-

“ you will be paid a monthly salary of ksh 350,000 (Three Hundred and Fifty thousand Only) subject to normal taxation, payable in arrears at the end of every month.”

This Clause does not state that the Claimant's salary was consolidated or contained an element to cater for the Claimant's housing. The claim for house allowance is therefore allowed pursuant to Section 31 of the *Employment Act* at 15% of the Claimant's salary for the eight months worked. That is ksh.52,500x8 = 420,000.

29. The claim for issuance of a Certificate of Service is allowed. The Claimant is entitled to be issued with a certificate of service by dint of Section 51(1) of the *Employment Act* 2007.
30. In sum, and having considered written submissions filed by Counsel for the Claimant, Judgment is hereby entered in favour of the Claimant against the Respondent as follows:-
  - a. six months' salary being compensation for unfair and wrongful termination of employment (ksh.350,000x6)  
.....ksh.2,100,000
  - b. salary arrears as computed by the  
Respondent's Financial Controller .....ksh.844,000



- c. two months' salary in lieu of notice .....ksh. 700,000
  - d. unpaid house allowance (ksh.52,500x8).....ksh.420,000
- Total ksh.4,064,000

- 31. The awarded sum is subject to statutory deductions pursuant to Section 49(2) of the *Employment Act* 2007, and the Respondent shall remit the statutory deductions to the relevant statutory bodies within thirty days of making the deductions.
- 32. The Respondent shall issue a Certificate of Service to the Claimant within thirty days of this judgment.
- 33. The Claimant is awarded costs of the claim and interest at Court rates.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19<sup>TH</sup> 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

