



**Mutinda v Graphic Lineups Limited (Cause 735 of 2016)  
[2022] KEELRC 1336 (KLR) (16 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1336 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 735 OF 2016**

**JK GAKERI, J  
MAY 16, 2022**

**BETWEEN**

**CHARLES KYALE MUTINDA ..... CLAIMANT**

**AND**

**GRAPHIC LINEUPS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant initiated this action by memorandum of claim filed on May 4, 2016 alleging wrongful and unfair termination by the Respondent.
2. The Claimant prays for –
  - i) Salary in lieu of notice Kshs.18,100.00
  - ii) Leave pay (  $\frac{18,100}{30} \times 21 \times \frac{8}{12}$  ) Kshs.85,522.50
  - iii) House allowance at 15% Kshs.219,915.00
  - iv) NSSF payments Kshs.13,200.00
  - v) Compensation for unfair termination Kshs.217,200.00

Total Kshs.553,937.50
3. The Claimant alleges that on or about October 2008, he was employed by the Respondent as a day maker at Kshs.12,000/= per month and subsequently he became a machine operator in 2013 at a monthly salary of Kshs.18,100/=.



4. It is averred that the Respondent did not issue an appointment letter, that he served the Respondent with loyalty and diligence until June 25, 2015 when his employment was terminated unlawfully and wrongfully without payment of terminal dues.
5. The Claimant avers that he was not given leave for seven years and the Respondent did not make NSSF contributions or deductions.
6. Finally, the Claimant further avers that his employment was terminated in contravention of the provisions of the *Employment Act*, 2007.

### **Respondent's Case**

7. The Respondent filed a response to the memorandum of claim on September 13, 2018. The Respondent denies having employed the Claimant in 2008 or promoted him in 2013 and avers that the Claimant was dismissed for gross misconduct.
8. It is the Respondent's case that on June 25, 2016, the Claimant refused to obey instructions of his supervisor relating to performance of his duties. That Mr. Albert Obeto, the Production Manager of the Respondent, requested the Claimant to effect some modifications but the Claimant dismantled the subject matter, threw the hammer and hacksaw at the Manager and walked away.
9. It is the Respondent's case, that the dismissal of the Claimant was not unlawful and he had been warned previously. That the Claimant's salary was inclusive of house allowance.
10. Finally, the Respondent states that the Claimant reported the matter to the Labour Office and the Respondent attended the meeting which found that the Claimant was entitled to payment for the days prior to dismissal.
11. The Respondent prays for dismissal of the suit with costs.

### **Claimant's Evidence**

12. The Claimant statement rehashes the contents of the memorandum of claim.
13. In his testimony, the Claimant told the Court that he served as a casual employee from October 6, 2008 but became a permanent employee in March 2011 at Kshs.12,000/= per month.
14. The Claimant testified he was terminated on June 25, 2015 by his boss Mr. Abdullahi Mohammed and no termination letter was issued and was not taken through a disciplinary hearing.
15. It was the Claimant's testimony that the Respondent paid NHIF and NSSF contributions on an off and paid was for the month of June 2015 or payment in lieu of notice.
16. On cross examination, the Claimant confirmed that he was employed on October 6, 2008, but the document on record is dated October 30, 2008, has no title of the author, name or signature other than an official stamp of the Respondent. That the document has no reference number.
17. The witness admitted at the NSSF statement relied upon and dated June 20, 2015 was provisional only and was not updated.
18. The Claimant further confirmed that he was out of employment from 2007 to 2010 and no NSSF contributions were made. That he raised the issue of leave allowance but had no evidence in support. That a transport allowance of Kshs.2,600/= was not paid.



19. The witness confirmed that the payslip for March 2011 showed that the gross pay was Kshs.13,200/=. He denied having destroyed anything on the date of dismissal and had no disciplinary issues with the employer. It was his testimony that although he reported the dispute to the Labour Office, he had no record of the complaint and did not attend a meeting with the Respondent at the Labour Office.
20. Surprisingly, the witness confirmed that he had nor payslip for 2008, 2009 and 2010 or evidence of any payment.
21. In re-examination the Claimant testified that he was given the document dated October 30, 2008 by the supervisor and salary was paid in cash per week for the days worked. That payslips were introduced in 2011 and had no entry for house allowance.
22. Finally, the witness confirmed that he was not invited for a disciplinary hearing.

### **Respondent's Evidence**

23. RW1 testified that on June 25, 2015, the Claimant was allocated duty but declined to perform and he was taken to the office he refused to respond to questions. He was requested to perform his duties and consult the witness later but he declined.
24. The witness told the Court that the Claimant was employed in 2011. That the salary paid by the Respondent was consolidated. It was his testimony that the document dated October 30, 2008 was fake.
25. That the NSSF statement was updated and all payments made.
26. That the Claimant had no outstanding leave from 2011 to 2015. The witness told the Court on June 25, 2015, the Claimant left the place of work without permission even after being given a chance to explain the circumstances and did not report to work thereafter.
27. On cross examination, the witness confirmed that the Claimant was confirmed as an employee in 2011. That those on probation had no weekly pay.
28. The witness confirmed that the employees went on leave. That the Claimant dismissed himself on June 25, 2015 and was not given a payslip since he was no longer an employee. That all dues were paid after the Claimant reported the dispute to the Labour Office.
29. On re-examination, the witness testified that the Claimant refused to do the work he was employed to do and was given the option to do so or quit. He left the premises and did not return. That employees were paid through the bank and the Claimant's file was misplaced.

### **Claimant's Submissions**

30. The Claimant isolates no specific issues for determination but alludes to what is referred to as undisputed facts, failure to controvert evidence tabled by the Claimant, disregard of the law, house allowance and prayers.
31. On undisputed facts, it is submitted that the Claimant has demonstrated that he was employed in 2008 by an oral contract and has a document to that effect. That he was diligent and was not taken through a disciplinary process.
32. As regards, failure to rebut the Claimant's evidence, it is submitted that document was given to the Claimant for purposes of payment of weekly wages and had the stamp of the Respondent. That the Claimant had proved that he was a causal employee for the period indicated.



33. It is the Claimant's submission that the Respondent tendered no documentary evidence to support its averments.
34. It is submitted that without the Claimant's file, it was difficult for the Respondent to be believed.
35. As regards disregard for the law it is submitted that the Respondent had not proved that it had a valid and fair reason to terminate the Claimant's employment contract.
36. Reliance is made on the provisions of Section 41 of the *Employment Act* 2007 as well as the Court of Appeal decision in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR to urge that the Claimant was not afforded a fair hearing.
37. On house allowance, it is submitted that the Claimant was entitled to house allowance by dint of Section 31 of the *Employment Act* as the payslips on record had no entry for house allowance. The Court is urged to find that the Claimant's salary was not consolidated.
38. Finally, the Claimant reiterates the payers sought.

### **Respondent's Submissions**

39. The Respondent identifies three issues for determination, namely:
  - (i) Whether the Claimant was employed by the Respondent;
  - (ii) Whether the Claimant's employment contract was unlawfully terminated;
  - (iii) Whether the prayers/reliefs sought are available to the Claimant.
40. As to when the Respondent employed the Claimant, it is the Respondent's submission that the Claimant did not prove that he was employed in 2008 as alleged, that the Claimant was employed in 2011 as copies of payslips provided by the Claimant show.
41. The Respondent submits that the document relied upon by the Claimant as evidence of employment in 2008 is neither a contract nor letter of appointment as prescribed by law. That the document is unintelligible and noncommutative and was not issued by the Respondent. That RW1 described it as forgery and came to the Respondent's attention when the suit herein was filed.
42. It is the Respondent's submission that the Claimant was employed in 2011 as pleaded and as evidenced by the payslips and the NSSF provisional statement on record. That although the Claimant was allegedly employed in 1999, there are no entries for 2007, 2008, 2009 and 2010.
43. That the missing years signified that the Claimant was not in pensionable employment as opposed to the years when no contributions were made.
44. That the Claimant could not have been an employee of the Respondent in 2008, 2009 and 2010 or in a pensionable position.
45. As to whether the Claimant's employment contract was unlawfully terminated the Respondent submits that it had shown by evidence, that the Claimant refused to perform his lawful duties and instructed by the supervisor Mr. Albert Obeto as even after persuasion by the Managing Director Mr. Noor Mohammed and no letter of dismissal was issued.
46. It is the Respondent's submission that the Claimant's conduct amounted to gross misconduct and sufficient to attract summary dismissal under Section 44(4)(c), (d) and (e) of the *Employment Act*, 2007.



47. It is further submitted that the allegation that the Claimant terminated his employment contract by not performing his duties was unchallenged. Reliance is made on Section 13(3) of the Employment Act 2007. That parties are bound by the pleadings.
48. The Court of Appeal decision in Galaxy Paints Company Limited v Falcon Guards Limited [1999] eKLR is relied upon. It is submitted that the provisions of the Employment Act, 2007 on termination are inapplicable in this case as the Claimant actually terminated his employment contact and thus there was no unlawful termination of employment.
49. As regards the prayers sought, the Respondent submits that the Claimant is not entitled to pay in lieu of notice since his employment was not terminated by the Respondent.
50. That the Claimant did not prove his entitlement not leave as the same had been taken and allowance paid.
51. It was the Respondent's submission that the Claimant's salary was consolidated and no house allowance was payable. The payslips record use the term "gross pay". The decision in Joseph Sani Orina v Hiprora Business Solution (EA) Limited [2017] eKLR to reinforce the submission.
52. The Court is urged to uphold the decision as a precedent.
53. Relatedly, the Respondent urges that the rate of 15% used by the Claimant ought to have been based on the basic pay as opposed to the gross pay. That house allowance is a form of special damages which must be pleaded and proved and Claimant had not done so by using an incorrect formula.
54. Reliance is also made on the Court of Appeal decision in Hahn v Singh [1985] eKLR to urge that special damages must be specifically pleaded and proved.
55. The Respondent further submits that requesting the Respondent to pay NSSF contribution is unlawful and premature as it is not founded on any law.
56. That the claim for NSSF contributions dates to 2007 when the Claimant was unemployed the entire 2008. The at the Claimant did not produce the final NSSF statement as evidence.
57. It is the Respondent's submissions that the decision in Pius Machafu Isindu v Lavington Security Guards Limited (*supra*) relied upon by the Claimant is irrelevant since the Claimant was not terminated.
58. Finally, the Respondent urges that the prayers for house allowance, NSSF contributions and leave allowance were an afterthought as the Claimant did not raise them when he was in employment.

### **Analysis and Determination**

59. After careful consideration of the pleadings, evidence on record and submissions of Counsel and the law, the issues for determination are: -
  - a) When was the Claimant employed by the Respondent;
  - b) Whether the termination of the Claimant's employment was unfair and unlawful;
  - c) Whether the Claimant is entitled to the reliefs sought.
60. The issue as to when the Claimant was employed by the Respondent is hotly contested. Whereas the Claimant contends that he was employed in October 2008, the Respondents case is that the Claimant was employed in April 2011.



61. To advance its case on this issue, the Claimant relies on a document on record dated October 30, 2008. The document is handwritten as follows:

“Charles Kyale Mutinda  
Die Maker Casual”

The document has a stamp of the Respondent dated 6<sup>th</sup> October 2008.

62. According to the Claimant, the document evidences the contract of employment between the Claimant and the Respondent.

63. The Respondent submits that the Claimant had not furnished evidence to show that he was employed in 2008. That the document relied upon is neither a letter of appointment nor contract of employment and is unintelligible and does not communicate any information. That it was not issued by the Respondent and RW1 denied its knowledge and described it as a forgery. RW1 testified that the Respondent had no casual labourers as the function is outsourced.

64. Several things are notable about the document on record:

- i. The document does not purport to be a letter of appointment nor a contract of employment.
- ii. It is not addressed to any or by any person.
- iii. It has no signature or other form of authentication other than a stamp.
- iv. It is unclear who drafted it.

65. The Respondent relies on the provisional NSSF statement dated June 25, 2015 to posit that the Claimant was employed in 2011 when the contributions commenced. The statement excludes 2007, 2008, 2009 and 2010 altogether. The Claimant admitted that he had no payslip for 2007, 2008, 2009 and 2010 and no contributions were made. The Claimant could not have been in a pensionable position.

66. The Claimant’s submission that it is the document the Respondent gave to casual labourers is not supported by evidence.

67. In light of the foregoing, it is the finding of this Court that the document dated 30<sup>th</sup> June 2008 is neither a letter of appointment nor evidence of an employment contract between the Claimant and the Respondent. The Respondent’s contention that the Claimant was employed in 2011 appears more credible and is reinforced by the provisional NSSF statement provided by the Claimant. Relatedly, the Claimant provided no payslip, bank statement or other evidence of having received payment from the Respondent from 2008 to 2010, a fact he admitted in evidence.

68. For these reasons, the Court is satisfied that the Respondent’s evidence as regards the date of employment outweighs that of the Claimant. It is the finding of the Court that the Claimant was employed by Respondent in May 2011.

69. As to whether the termination of the Claimant’s employment contract was unfair, the home port are the provision of the *Employment Act*, 2007.

70. Section 45(2) of the *Employment Act*, 2007 provides inter alia that:

- (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 employees 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.

71. Relatedly, Section 43(1) of the Act sets out the burden of proof on the part of the employer.
72. Finally, Section 47(5) of the Act reinforces the obligations of the parties to a claim of unfair termination.
73. It requires no emphasis that these provisions have been enforced and applied in innumerable decisions by this Court and the Court of Appeal.
74. The Court of Appeal decision in *Pius Machafu Isindu v Lavington Security Guards Limited* (*supra*) relied upon by the Claimant is one of them.
75. Judicial authority on termination of employment contracts is categorial that a fair and lawful termination of employment must be substantively justifiable and must have been conducted in accordance with a fair procedure. See *Naima Khamis v Oxford University Press [EA] Ltd* [2017] eKLR and *CMC Aviation Limited v Mohammed Noor* [2015] eKLR)
76. While the Claimant alleges that his termination from employment was unfair, the Respondent submits that the Claimant's employment was not terminated. That he basically left the workplace after refusing to perform his duties as directed by the supervisor and as advised by the Managing Director.
77. It is not in dispute that the Respondent did not issue a dismissal letter or notice to show cause after the Claimant refused to act in accordance with the Supervisor's instructions. See *Boniface Mwangi v B.O.M. Iyego Secondary School* [2019] eKLR and *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR.
78. Strangely, neither the memorandum of claim nor the written statement provides a detailed narrative of how the alleged termination took place.

### **Reason for Termination**

79. While the Respondent alleges that the Claimant failed to obey instructions of the Supervisor and advice of the Managing Director and actually left his workplace never to return and thus terminated his employment contract, the Claimant provided no reason for the termination.
80. The Respondent submits that on June 25, 2015, the Claimant was allocated a duty by the Supervisor but declined to perform and was reported to the Managing Director who advised him to perform his duties and raise any issue he had later. The Claimant was adamant and left.
81. That the Claimant's behaviour amounted to gross misconduct and could justify summary dismissal but he was not dismissed.
82. The Court is in agreement with the Respondent's submission that the Claimant did not respond to the Respondent's defence and that parties are bound by their pleadings as exquisitely put by the Court of Appeal in *Galaxy Paints Company Limited v Falcon Guards Limited* (*supra*).
83. The Claimant admitted that he knew Mr. Albert Obeto and that he was dismissed by Mr. Noor Mohammed but did not explain the circumstances in which the termination took place.



84. Although the Respondent had a valid and fair reason to dismiss the Claimant from employment, it states that it did not do so. However, its submission that the Claimant dismissed himself is patently unsatisfactory to justify how the Claimant left employment.
85. Granted that the Claimant left his place of work and did not return, it was the duty of the Respondent to take him through the disciplinary process for purposes of compliance with the law and to close the matter.
86. The Respondent ought to have written a notice to show cause to the Claimant to explain why his employment contract should not be terminated for having refused, failed or neglected to perform his duties or obey instructions of his supervisors. A termination letter would then follow. It did not do so.

### **Procedure for Termination**

87. Section 45(2) of the *Employment Act* provides that:
  - (2) A termination of employment by an employer is unfair if the employer fails to prove –
    - (a) ...
    - (b) ...
    - (c) that the employment was terminated in accordance with fair procedure.
88. Section 41 of the Act embodies the procedural precepts to be complied with in a summary dismissal or termination of employment by the employer.
89. The Court of Appeal decision in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR itemises the specific procedural steps to be complied with in the termination of a contract of employment.
90. In the instant case the Claimant testified that he was neither given a letter of termination of employment nor taken through a hearing as ordained by the provisions of the *Employment Act* and RW1 confirmed as much.
91. There is no evidence on record to show that the Claimant was invited to a disciplinary hearing or attended any hearing or that there was a meeting.
92. For the foregoing reasons, it is the finding of the Court that the Claimant has on a balance of probability established that termination of his employment contract by the Respondent was unfair for want of procedural propriety.

### **Reliefs**

93. Having found that termination of the Claimant's employment contract by the Respondent was unfair, the Claimant is entitled to the reliefs is provided by law in such circumstances.

#### **(a) Salary in lieu of notice Kshs.18,100/=**

94. From the evidence on record, it is unclear when the Respondent terminated the Claimant's employment or dismissed him. As adverted to elsewhere in this judgment, neither the memorandum of claim or the witness statement nor the oral evidence of the Claimant explain the circumstances in which the alleged termination of employment took place. Particulars on how and when Mr. Noor Mohammed terminated the Claimant's employment or dismissed him were never articulated or a letter of termination issued to the Claimant.



95. In the absence of positive evidence on how the Respondent terminated the Claimant's employment or dismissed him from employment, the remedy of salary in lieu of notice under Section 49(1)(c) of the Employment Act is not sustainable. The prayer is declined.

**(b) Leave pay Kshs.85,522.50**

96. While the Claimant testified he did not proceed on leave of the duration of employment, the Respondent's evidence is that the Claimant had no pending leave days and leave allowance had been paid.

97. The Claimant tendered no evidence why he did not proceed on leave on applied for leave and the application was rejected. In the absence of proof that leave was not taken, the prayer is declined.

**(c) NSSF payments Kshs.13,000**

98. The provisional NSSF statement on record shows that the Claimant was an employee elsewhere from 1996 and 2006 and was either out of work or serving in a non-permanent position from 2007 – 2010. The Respondent's witness testified that the NSSF statement was updated and all payments made. Regrettably, the Claimant did not provide a final statement.

99. Similarly, the Court is in agreement with the Respondent's submission that NSSF contributions are payable by employers in accordance with the provisions of the National Social Security Fund Act, No. 45 of 2013 and non-payment of any contribution or any other amount due is a criminal offence punishable by law.

100. In addition, it is the duty of the NSSF Board to recover debts due to the organisation. It has not been shown that the NSSF Board has no capacity to enforce the provisions of the National Social Security Fund Act. Needless emphasise, NSSF contributions are made to the NSSF towards the pension payable to the contributor upon attaining retirement age. For these reasons, the claim is declined.

**(d) House allowance at 15%**

101. Although RW1 confirmed on cross examination that the Claimant had been given a written contract, the Respondent did not provide a copy and testified that the salary was all inclusive, that is consolidated, but provided on evidence of the consolidation. In the premise, the only authoritative document on the salary paid to the Claimant is the payslip, which is not a contract. RW1 confirmed that the payslips on record did not show payment of house allowance.

102. On cross examination, the Claimant confirmed that the payslip dated March 31, 2015 had no entry for house allowance. The only allowance provided is transport at Kshs.2,600/=.

103. Similarly, the payslip dated March 2011 showed a gross pay of Kshs.13,200/= including net attendance of Kshs.1,200/=. Both payslips have an entry for basic salary and no house allowance.

104. Granted that housing is a statutory entitlement by dint of Section 31 of the Employment Act, 2007, and the Respondent has not demonstrated that the provisions of Section 31(2) applied, it is evident that the Respondent did not pay house allowance and the Claimant is entitled to the same at the rate of 15% as confirmed by the Court of Appeal. In Grain Pro Kenya Inc. Ltd v Andrew Waitbaka Kiragu [2019] eKLR where the Court stated as follows:

“To us 15% is reasonable percentage that an employee spends from part of a salary to pay house rent.”



105. Consequently, the Claimant is awarded house allowance at 15% of the basic pay. The Court is in agreement with the Respondent's submission that house allowance should be computed on the basis of the basic not gross salary.

**(e) Compensation for unfair termination Kshs.217,200/=**

106. Having found that the termination of the Claimant's employment was unfair for want of procedural fairness, the Claimant is entitled to the discretionary relief provided by Section 49(1)(c) of the Employment Act subject to observance of the provisions of Section 49(4) of the Act.

107. In arriving at the level of compensation, the Court has taken into consideration the following circumstances: –

- i) The Claimant substantially contributed to the termination of his employment contract.
- ii) From the evidence on record, it is unclear as to whether the Claimant wished to continue in the employment of the Respondent.
- iii) The Claimant served the Respondent diligently and had no previous record of misconduct or indiscipline.
- iv) From the evidence on record, the Claimant was an employee of the Respondent from May 2011 to June 25, 2015, a duration of four years one month and 25 days.
- v) The Claimant did not appeal the termination.

108. In the circumstances the equivalent of three months' salary is fair.

109. In conclusion, judgment is entered for the Claimant against the Respondent in the following terms:

- a) House allowance at 15% of the Claimant's basic salary at the date of termination of employment for the entire duration of employment of four years, one month and twenty five days.
- b) The equivalent of three (3) months' gross salary.
- c) Costs of this suit.
- d) Interest at Court rates from the date of judgment till payment in full.

110. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16<sup>TH</sup> 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

