



**Kibirir v Mediheal Hospital & Fertility Centre (Cause 80 of 2017)  
[2022] KEELRC 1167 (KLR) (9 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1167 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE 80 OF 2017  
NJ ABUODHA, J  
MAY 9, 2022**

**BETWEEN**

**DAVID KIPCHUMBA KIBIRIR ..... CLAIMANT**

**AND**

**MEDIHEAL HOSPITAL & FERTILITY CENTRE ..... DEFENDANT**

**JUDGMENT**

1. The claimant pleaded that he was employed as a chef in the respondent's cafeteria with effect from 5<sup>th</sup> February, 2012 at a monthly salary of Ksh. 22,264/-. He worked for the respondent until 22<sup>nd</sup> November, 2015 when the respondent unlawfully and unfairly terminated his service and refused to pay his terminal benefits.
2. According to the claimant, the respondent terminated his service on the allegation that he had been seen with a black paper bag at the wrong gate and that the claimant had stolen left over food which according to the claimant was not true. The claimant further alleged that his service was terminated without following the right procedure under the *Employment Act*. That is to say no show cause letter was given to him and no disciplinary hearing took place.
3. The respondent in defence to the claim pleaded among others that it followed due procedures and protocol laid down in its human resource policy and *Employment Act, 2007*.
4. The respondent further stated that the prayers itemised under paragraph 11 of the statement of claim were fictitious and abuse of the Court process.
5. At the oral hearing the claimant confirmed he was employed on 5<sup>th</sup> February, 2012 as a cook earning Ksh. 22,264/= and that he was dismissed on 22<sup>nd</sup> November, 2015.



6. According to the claimant, he was called to the office and told to go home and stay until he was called back to work. He adopted his witness statements recorded on 16<sup>th</sup> May, 2016. He further relied on the documents filed with the claim.
7. The claimant stated that he was not given any show cause letter nor was he given a termination letter and further that there was no disciplinary hearing before dismissal.
8. Upon termination, the claimant alleged he was not paid his terminal dues. During the period he worked, he was not paid house allowance and that he used to report to work at 5.00 am and leave at 3.00 pm but was never paid overtime. Further he never went on leave during the period he worked and was not paid in lieu for leave. The claimant further stated that he was never shown the CCTV footage.
9. In Cross -Examination he stated that his appointment letter showed he used to earn Ksh.16,420/-.
10. Regarding termination, he stated that on the material day he was at work and clocked out around 3.30 pm to check on his neighbours child who was sick at the wards. He was however told he had trespassed. He was called from the reception and told he was seen passing through the wrong gate carrying a black paper gag. He denied having any paper gag. According to him, the respondent had two gates and one could use any. On each gate there was a security guard who would conduct a search before one leaves. On the material day he was searched and nothing was found on him. He however never came back to work the following day because he was told not to. According to him, the respondent informed him that he would be called but after one week he went to find out what was happening when he did not receive his salary for the month.
11. It was his evidence that he was never summoned to any disciplinary hearing.
12. The respondent's witness Ms. Meryline Lagat informed the Court that she worked for the respondent as an administrator she adopted as her evidence in chief, the witness statement recorded on 16<sup>th</sup> November, 2017. According to her, Security reported a staff who had walked out with a yellow bag through gate B. this gate according to her was not for use by staff. The staff had been advised by a memo to use only gate A. according to her the claimant was called back but refused to come back. When he came back to work the following day, she issued instructions that he should not work unless he cleared with her. It was her evidence that when she asked the claimant why he used gate B and what was in the yellow bag, the claimant became uncooperative. He said there was nothing wrong with using gate B. the claimant then walked away from the office. She prepared her report and handed the same to the administration for further action. It was her evidence that the claimant was called severally to come for disciplinary meeting but never came.
13. In cross-examination she stated that they wrote a show cause letter but the claimant never collected it. The letter was however not produced in court. She denied the claimant was working as a chef.
14. Concerning leave, it was her evidence that the claimant went on leave and further that the leave card was kept by the respondent. It was further her evidence that the respondent remitted both NSSF and NHIF dues.
15. Regarding reporting time, it was her evidence that the claimant reported to work at 5.00am and left at 2.00pm. further all staff were required to use gate A and assignment of rules about exit were given to security.
16. It was her evidence that the claimant was called severally to come for disciplinary hearing but never came and further that staff were allowed to visit sick friend and relatives at the hospital and further that all luggage were kept at the gate.



17. Ms. Marylyne further stated that she was summoned by Eldoret Labour Office over the matter.
18. Section 41 of the *Employment Act* makes it a requirement that before an employer terminates the service of an employee, he must explain to such employee in a language such employee understands the reasons for the intended dismissal and further that the employer ought to listen to any representation such employee or his representative may make concerning the dismissal.
19. This is why it is usually a necessary requirement that prior to dismissal there ought to be some sort of disciplinary hearing. In this particular case, the claimant was accused of exiting work place using the wrong gate and while carrying a parcel which was suspected to be containing left over food.
20. The claimant is alleged to have resisted instructions by security to use the correct gate and further to have the bag inspected. When he came back to work the following day and was asked by the administrator (RW2) about the incident he is alleged to have said that there was nothing wrong with what he did and walked away from the administrators office and never came back.
21. The respondent further alleged that it called the claimant severally to collect his show cause letter and notice for disciplinary hearing but the claimant never came. None of these letters were however produced in court.
22. Whereas the respondent alleged that they did not know where the claimant lived. They could have either sent the letters and notices to the claimant's last known address or served them upon him at the Labour Office where the claimant had reported the dispute and they had been summoned.
23. The court takes the view that whereas the respondent may have had valid reasons for terminating the claimant's service, he ought to have been heard before such termination was effected and where such hearing was not possible through the conduct of the claimant, evidence ought to have been placed before the court to show reasonable steps were taken to subject the claimant to disciplinary process but were frustrated by the claimant.
24. In the circumstances the court makes a finding that the claimant's service was unfairly terminated for the reasons that he was never subjected to any disciplinary hearing before termination.
25. On the claim for service gratuity, the claimant's payslip for October, 2015 attached with the claim showed he was registered as a contributor of NSSF. This claim is therefore not sustainable. Further on the claim for overtime, the claimant did not specify the nature of the work he performed that required him to work overtime. further in his evidence he stated that he used to report to work at 5.00am and leave at 3.00 pm while the respondent stated that they had two shifts and that the claimant was in the shift that used to report at 6.00 am and leave at 2.00pm.
26. The claimant further did not state the period he worked overtime. It could not have been possible that the claimant worked overtime daily and was never paid and never raised the issue at all until his service was terminated. The claim for overtime is therefore rejected for the above reasons.
27. Concerning the claim for house allowance, this claim will be allowed since it is a mandatory requirement under the *Employment Act* that an employer provides housing or an allowance in lieu. The payslip produced as one of the claimant's documents does not show house allowance was provided for. The Court therefore awards the claimant the sum of Ksh. 150,282/= as house allowance calculated at 15% of his basic pay for the period he worked for the respondent.(45 months).
28. Regarding compensation for unfair termination, the claimant on his part neither alleged nor produced any evidence to show that he attempted to resume work but was refused by the respondent besides his report to the County Labour Office was that his service had been terminated. He did not complain



to the Labour Office that he had been asked by the respondent to stay at home until he was called in order for the labour office to take up the matter on his behalf. The allegation by the respondent that he refused and or ignored to report to work for the disciplinary hearing to take place could therefore be plausible. In the circumstances the court finds an award of three months salary as reasonable compensation for unfair dismissal.

29. In conclusion the Court awards the claimant as follows:

- a. Three months' salary as compensation for unfair termination Kshs.66,792
- b. House allowance Kshs.150,252  
Total Kshs. 217,074
- c. Costs of the suit award is subject to taxes and applicable statutory deductions.

30. It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 9<sup>TH</sup> DAY OF MAY, 2022**

**ABUODHA NELSON JORUM**

**JUDGE ELRC**

