



**Gatimu v Uzuri Foods Limited (Cause 2195 of 2017)
[2022] KEELRC 19 (KLR) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 19 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2195 OF 2017**

JK GAKERI, J

MAY 5, 2022

BETWEEN

PAUL MAINA GATIMU CLAIMANT

AND

UZURI FOODS LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this action by way of a statement of claim dated 31st October 2017 and filed on 3rd November 2017 alleging unlawful termination and refusal to pay terminal dues.
2. The Claimant prays for –
 - i. A declaration that the Claimant’s termination from employment was unfair, wrongful and devoid of procedure.
 - ii. The Claimant be paid his terminal benefits as set out in paragraph 10 totalling Kshs.6,486,164.51
 - iii. The Court issue such orders and give such directions as it may deem fit to meet the ends of justice.
 - iv. The Respondent to bear the costs of this claim in any event.
 - v. Interest on the above at Court rates.
 - vi. Certificate of service.
3. The Respondent filed the reply to the statement of claim on 19th January 2018 praying for dismissal of the suit with costs.



Claimant's case

4. The Claimant avers that he was employed by the Respondent on 26th November 2002 as a sales person in its marketing department at a salary of Kshs.8,000/- per month which gradually increased to Kshs.29,763.00 as at the date of termination.
5. That he worked for the Respondent faithfully and diligently until 10th July 2017 when he was summoned by the Human Resource Manager and issued with a notice to show cause and a termination letter dated 2nd June 2017. That he responded to the notice to show cause and attempts to enquire about the reason(s) for termination of employment elicited not response but a clearance form to facilitate payment of terminal dues but he declined to sign the form.
6. It is averred that the termination of employment was unilateral and without reasons. That prior to the termination of employment, he had sought Kshs.104,933/- being the balance of money he was entitled to as compensation for injuries sustained at the work place which the Respondent had promised to pay once it was budgeted for.
7. That the Respondent did not give the Claimant any notice of the impending termination of employment or letter to show cause and refused to pay terminal dues.

Respondent's case

8. The Respondent's case is pleaded as follows: It is the Respondent's case that the Claimant was lawfully terminated from employment on 2nd June 2017 for absconding duty and a show cause letter dated 10th July 2017 was issued. It is averred that the Claimant did not report to work from 24th May 2017 to 2nd June 2017 and gave no explanation for his absence.
9. The Respondent admits its willingness to pay the rightful terminal dues to be Claimant and issue a certificate of service. That the requirement to clear with various departments was intended to facilitate payment of terminal dues.
10. Finally, it is contended that the Claimant committed a fundamental breach of his contractual obligations necessitating

Summary dismissal.

Evidence

11. The Claimant adopted his statement and was cross examined. The statement rehashes the contents of the statement of claim. On cross examination the witness confirmed that he was injured in 2005 and was paid Kshs.144,667.00 by cheque from the company. That he was supposed to be paid Kshs.249,600/- as per the DOSHI/WIBA Form dated 23rd November 2012.
12. The Claimant confirmed that he did not receive any communication from the Director of Occupational Safety and Health Services on the amount payable to him for the injuries. That the insurer approved Kshs.144,607/-.
13. Although the Claimant stated that he was at work from 24th May to 10th July 2017, he confirmed that he had no payslips for May and June 2017 and was not paid for the two months and the detail was not included in the statement, thus not prayed for. That he received the notice to show cause and responded. That he was not sure of the Supervisor's name but would report to work but was not allocated duties.



14. The Claimant confirmed that his appointment letter had his postal address but denied having received the dismissal letter by post. He admitted that he both letters but denies having signed on the termination letter.
15. The witness confirmed that the security deductions commenced when he was employed but had no payslip from 2002 to 2015 to show the deductions. That he used to work for six hours overtime per day and had not been paid though the payslip he provided show that he had been paid for overtime.

Respondent's evidence

16. RW1 Quinter Ouma adopted the written statement and was cross examined. The witness testified that the Claimant was compensated for the injuries in accordance with the Workmen Compensation Act as opposed to the *Work Injury Benefits Act*, and the insurance company paid the amount due.
17. It was RW1's testimony that the Claimant absconded duty from 24th May 2017 to 2nd June 2017 and the dismissal letter was posted to his address. That he showed up on 10th July 2017 as well as 27th July 2017 when he received the notice to show cause and responded and the dismissal letter was served upon him.
18. RW1 testified that overtime if earned was payable at the end of the month as the Claimant's payslip showed. That the Claimant was not on duty in May and June 2017.
19. On cross examination the witness told the Court that Mr. Riechi was a Supervisor in the Sales Department but had since left the Respondent. That the Claimant was not taken through a disciplinary hearing before dismissal. That the Claimant did not clear with the Respondent and was not paid a month's salary in lieu of notice.
20. That the Claimant worked from 8.00 am to 5.00 pm and was assigned the Nairobi route not upcountry. That the insurer determines the amount payable for injuries not the Director, Occupation of Safety and Health Services under WIBA.
21. On re-examination RW1 stated that Mr. Riechi, the Supervisor is the one who reported that the Claimant had absconded duty effective 25th May 2017. That the Claimant signed the notice to show cause letter on 10th July 2017 and the dismissal letter on 27th July 2017 in the office of the Human Resource Manager. That the Director, Occupation of Safety and Health Services (DOSHS) did not respond to the letter dated 19th October 2017.

Claimant's submissions

22. The Claimant identifies four (4) issue for determination, namely, whether:
 - i. The Respondent had a justifiable reason to terminate the Claimant's employment;
 - ii. The procedure was complied with;
 - iii. The Claimant is entitled to the reliefs sought;
 - iv. Costs.
23. As to whether the Respondent had a reason to terminate the Claimants employment, reliance is made on Section 43(1) and 45(2) of the *Employment Act* to urge that there were no valid reason why the Claimant's employment was terminated on 10th July 2017 as no investigations were conducted to authenticate Mr. Riechi's allegations of absconding duty and the letter was relied upon to dismiss the Claimant.



24. That the Claimant had been following up work injury benefits with the employer and unpaid salaries for May and June 2017.
25. As regards compliance with the prescribed procedure, it is contended that the Claimant was never summoned to a disciplinary hearing or face the accuser. Reliance is made on Section 41 of the [Employment Act](#) to urge that the mandatory provisions of the law were not complied with. The Claimant cited no judicial authority to reinforce its submissions.
26. As to whether the Claimant is entitled to the reliefs sought it is urged that the Claimant was not paid his dues on termination and is thus entitled to one month's salary in lieu of notice, salary for May and June 2017, salary for 10 days worked in July 2017, security deductions, overtime withheld, 12 months' compensation for wrongful loss of employment and a certificate of service.

Respondent's submissions

27. The Respondent identifies two issues for determination namely:
 - i. Whether termination of the Claimant's employment was substantively and procedurally fair;
 - ii. Whether the Claimant is entitled to the reliefs sought.
28. As to whether termination of employment was fair, the Respondent relies on the provisions of Section 44(4)(a) of the [Employment Act](#) on summary dismissal and Section 43 on proof of reason for termination to urge that the Claimant knew Mr. Riechi and admitted that he had been assigned the Thika Road route as indicated by Mr. Riechi. That the Claimant acknowledged having received the notice to show cause.
29. The Respondent submits that the Claimant adduced no evidence to prove that he was paid for the months of May and June 2017 or demonstrate that he was on duty. That his termination was justified.
30. It is the Respondent's submission that it has discharged the statutory burden placed on it by Section 43 of the [Employment Act](#).
31. On procedure, it is the Respondent's submission that after receipt of Mr. Riechi's report/letter dated 2nd June 2017, it proceeded to dismiss the Claimant and his postal office address was 28272 Nairobi, according to the letter of appointment. It is submitted that the Respondent made reasonable attempts to reach the Claimant through his last known address and telephone contracts.
32. Reliance is made on the decision in *Julius Kyalo Malonza v Ruth Osolo t/a Eraeva Catering Services* [2021] eKLR to urge that reasonable attempts were made to reach the Claimant.
33. It is the Respondent's submission that the Claimant was accorded an opportunity to explain himself consistent with the provisions of Section 45(5) of the [Employment Act](#) which requires the employer to ensure that the circumstances render it just and equitable that the employee be terminated.
34. It is further submitted that the Claimant did not appeal the decision to dismiss him from employment. That he did not clear with the Respondent and could not therefore be issued with a certificate of service.
35. The Respondent prays for dismissal of the claim and relies on the decision in *Catherine Mugure v Hill Court Hotel & Spa Limited* [2019] eKLR where the Claimant had absconded duty and her case was dismissed with costs to the Respondent.



Determination

36. From the pleadings, evidence on record and submissions by Counsel, the issues that commend themselves for determination are whether: -
- a. The termination of the Claimant's employment was lawful or unfair;
 - b. The Claimant is entitled to the reliefs sought.
37. As to whether the Claimant's employment was lawfully terminated, the Court is guided by the provisions of Section 41, 43, 44, 45 and 47(5) of the *Employment Act*, 2007 which provide for the substantive and procedural attributes of a fair or lawful termination of an employment contract.
38. A summary of some of these provisions was highlighted by the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR as follows:
- “There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employer in matter of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (Section 47(5)), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination... These provisions are a mirror image of their constitutional underpinning in Article 41 which governs rights and fairness in labour relations ...”
39. Similar entitlements were expressed in *Naima Khamis v Oxford University Press [EA] Ltd* [2017] eKLR.
40. Needless to emphasise, judicial authority is unshakeable that for a termination of employment to be deemed lawful and fair, it must be substantively justifiable and must have been conducted in accordance with a fair procedure as prescribed by law.
41. The Court is guided and bound by these sentiments.

Reason(s) for termination

42. The letter of dismissal dated 2nd June 2017 and received by the Claimant on 27th July 2017 states that the Claimant had not reported on duty since 24th May 2017 wrongly stated as 2016 and had not communicated his whereabouts to the management. Whereas the Claimant insisted that he was at work on 24th May 2017 and after until 10th July 2017, the Respondent was emphatic that the Claimant absconded duty on 24th May 2017 and only resurfaced on 10th July 2017 and on 27th July 2017. On 10th July 2017 he received the show cause letter and responded on the same day.
43. Strangely, the Claimant did not contest the of any of the letters other than the receipt signature which he disowned.
44. It is the Claimant's testimony that he was not paid for the months of May, June and for 10 days of July 2017. However, the Claimant led no evidence on why he was not paid for this duration any if he was in fact rendering services as an employee of the Respondent. He admitted that he had no payslips for May and June 2017. Although the Claimant states that he used to inquire from the office, he did not disclose which office or the person(s) involved and the response he received. He led no evidence on the nature of the complaint.



45. As submitted by the Respondent, the handwritten letter dated 2nd June 2017 allegedly written by one Riechi states that the Claimant was assigned the Thika Road Route but left on 24th May 2017. The Claimant admitted that he was on this route. The written notice is addressed to the Sales Manager, Mr. Silas Majani. This letter reinforces the allegation that the Claimant actually absconded duty which perhaps explains why he was not paid the salary for May, June and 10 days in July 2017.
46. Intriguingly, the Claimant is not claiming the salary for the month of July yet he received the dismissal letter on 27th July 2017. Could he have been aware of the letter allegedly posted to his postal address? Relatedly and noteworthy, although the Claimant admitted to having a supervisor, he was emphatic that he was not sure of his name. According to the Respondent's evidence, Mr. Riechi was the Claimant's supervisor and reported to the Sales Manager, Mr. Majani. Contrary to the Claimant's submission that he was reporting to Mr. Silas Majani, the Sales Manager, the Claimant could not have been reporting to the Manager if there was a supervisor as he admitted on cross examination.
47. It is the Claimant's testimony that he reported to the workplace every day in May, June and 10 days in July 2017 but was not assigned duties. From the evidence on record, there is no evidence to whom the Claimant would report and why he was not allocated work or the explanation provided by management or the supervisor.
48. From the evidence on record, the Court is satisfied that the employer has on balance of probabilities established that it had a valid and fair reason to dismiss the Claimant from employment on 2nd June 2017. The submission that the Claimant was dismissed for insisting on payment of the balance of compensation for the injuries sustained in 2005

Is unsupported by evidence.

Procedure

49. Section 41 of the *Employment Act* prescribes the procedural precepts to be complied with if a termination of employment is to pass the procedural fairness test. The specific steps were elaborated by the Court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, as follows:
- “Four elements must thus be discernible for the procedure to pass muster: -
- i. An explanation of the grounds of termination in a language understood by the employee.
 - ii. The reason for which the employer is considering termination.
 - iii. Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made.
 - iv. Hearing and considering any representation made by the employee and the person chosen by the employee.”
50. Contrary to the Respondent's submissions that the Claimant was given an opportunity to explain himself, its evidence confirmed that the Claimant was not invited for a disciplinary hearing nor was he taken through any disciplinary process.
51. As regards attempts to contact or reach the Claimant, the Respondent tendered no evidence that the letter of dismissal was actually posted. No postal record or registration was provided in support of the allegation. Relatedly, the Respondent did not disclose the member of staff who called the Claimant



on his mobile number and when. The Court is not persuaded that the Respondent made reasonable attempts to reach the Claimant.

52. The decision in *Julius Kyalo Malonza v Ruth Osolo t/a Eraeva Catering Services* [2021] eKLR relied upon by the Respondent is distinguishable in that the Respondent reported the desertion to the Labour Office. In the instant case no report was made.
53. From the evidence on record, it is clear that the procedural requirements provided by Section 41 of the [Employment Act](#) were not complied with.
54. It is the finding of the Court that termination of the Claimant's employment contract by the Respondent on 2nd June 2017 was procedurally flawed and thus unfair.

Reliefs

55. Having found that termination of the Claimant's employment was unfair for want of procedural propriety, I will now proceed to examine the individual prayers sought by the Claimant:
 - a. One month's salary Kshs.29,763/-
56. RW1 confirmed on cross examination that the Respondent did not pay the one month's salary in lieu of notice. The same is awarded.
 - b. Salary for May, June and 10 days in July 2017
57. Having found that the Claimant absconded duly on 24th May 2017 and thus did not render any service to the Respondent for the entire duration, as confirmed by RW1, the claim for unpaid salary is declined.
 - c. Security deductions Kshs.360,000/-
58. RW1, testified that the amount deducted from employees was a deposit in case of loss by an employee and the amount was available to the employees in the event of cessation of employment.
59. However, although the Claimant testified that the amount was deducted from 2002, he had no payslip to demonstrate any deductions from 2002 to 2015.
60. Consequently, the Claimant is awarded the security deductions effective October 2016 to April 2017.
 - d. Overtime worked Kshs.5,563,339.20
61. Although the Claimant testified that he worked for six hours overtime per day, and confirmed that he had not been paid, a copy of the payslip for January 2017 which he provided as evidence of his gross salary showed that he had in fact received payment for overtime for the month of January 2017 having worked for 24 hours as overtime contrary to the six hours per day. RW1 confirmed that overtime earned was paid at the end of each month.
62. More significantly, particulars of the prayer have not been provided.
63. In the absence of evidence to the contrary, the claim for overtime is disallowed.
 - e. Illegally withheld work injury compensation Kshs.104,933/-
64. It is common ground that the Claimant was injured in 2005 and Kenindia Insurance Company Limited paid the sum of Kshs.44,667/-. The Respondent's cheque to the Claimant is dated 27th September 2013. The Claimant alleges that he was entitled to Kshs.249,600/- as indicated in DOSH/WIBA 4 form dated 23rd November 2012. This explains the sum of Kshs.104,933/- claimed as the balance.



65. Issue is whether the Claimant is entitled to the sum of Kshs.104,933/- allegedly withheld by the Respondent.
66. By a copy of the DOSH/WIBA dated 23rd November 2012, the quantum of compensation due to the Claimant was assessed at Kshs.249,600/-. A subsequent letter by the Respondent to the Director of Occupational Safety and Health Services (DOSHS) dated 30th July 2013 intimated that since the injury occurred in 2005, the applicable law was the Workmen Compensation Act as opposed to WIBA and the assessment had thus changed from Kshs.249,600/- to Kshs.144,667/-. A copy of the revised DOSHI WIBA for claim Ref. No. WIBA/NBI/3046/2013 was enclosed. The letter requests the Director to adjust the amount payable accordingly.
67. No reply was forthcoming from the Director and Kenindia Assurance Company Limited, the Respondent's insurer paid Kshs.144,667/- which the Claimant received via cheque no. 014016 dated 27th September 2013. The discharge voucher was not signed.
68. A subsequent letter by the Respondent to the Director elicited no response. It is unclear why the Respondent used the DOSH/WIBA 4 form to assess the Claimant's compensation yet the injury occurred more than three years before the Work injury Benefits Act, Act No. 13 of 2007 became operational on 2nd June 2008.
69. The law applicable then was the Workmen Compensation Act and the Respondent appear to have been unaware of this fact until it was brought to its attention by the insurer by letter dated 9th July 2013.
70. The Claimant's prayer for the sum of Kshs.104,933/- is based on the DOSH/WIBA 4 form dated 23rd November 2012 which assessed the compensation at Kshs249,600/-, the Respondent should have kept the Claimant posted on the processing of the claim and the basis on which payment was made to temper his expectations. The Claimant is unaware of the subsequent assessment dated 14th August 2013 but received the payment as a sign of good faith.
71. The material before the Court is insufficient for the Court to made a determination that the Claimant is entitled to the sum of Kenya shillings 104,933/-. The claim is declined.
 - f. 12 months' salary compensation 29,763 x 12 months – Kshs.357,156/-
72. Having found that the Claimant's termination of employment was unfair for want of procedural fairness, the Claimant is entitled to the reliefs provided by Section 49(1)(c) of the Employment Act subject to taking into consideration the factors enumerated in Section 49(4) of the Act. In determining the quantum of compensation due to the Claimant, the Court has taken into account the following –
 - i. The Claimant was an employee of the Respondent for about fourteen years and seven months and wished to continue.
 - ii. The Claimant substantially contributed to the termination of employment.
 - iii. The Claimant did not appeal the decision.
73. In the circumstances the equivalent of five months is fair.
 - g. Certificate of service
74. Respondent to issue a certificate of service by dint of Section 41 of the Employment Act, 2007.
75. In the final analysis, judgment is entered for the Claimant against the Respondent in the following terms:



- a. One month's salary in lieu of notice.
- b. Security deductions from October 2016 till the date of termination.
- c. Equivalent of five months' gross salary.
- d. Certificate of service.
- e. Costs of this suit.
- f. Interest at court rates from date of judgment till payment in full.

76. Orders accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5TH 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 15th March 2020 and subsequent directions of 21st 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

