



**Nzuki v Brother Shirts Factory Limited (Cause 206 of 2017)
[2022] KEELRC 1762 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1762 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 206 OF 2017
K OCHARO, J
JUNE 30, 2022**

BETWEEN

ANNASTACIA NDANU NZUKI CLAIMANT

AND

BROTHER SHIRTS FACTORY LIMITED RESPONDENT

JUDGMENT

Introduction

1. This suit was initiated through a statement of claim dated 9th January 2017, wherein the Claimant alleged that his employment was unjustifiably and unfairly terminated from employment by the Respondent and seeks against it the following orders;
 - a. A declaration that the claimant was dismissed irregularly, unlawfully, unfairly, wrongfully, un-procedurally, without cause or justification and in breach of the law.
 - b. Terminal benefits and compensatory damages at Kshs. 56,715.75/=.
 - c. General damages for breach of contract and wrongful dismissal.
 - d. Punitive damages for victimization of the claimant by the Respondent.
 - e. Interest on (b) to (d) above.
 - f. Certificate of service.
 - g. Costs of this suit.
 - h. Any other/further relief that this Honourable Court may deem fit to grant in the interest of justice.



2. In response to the claim, the Respondent filed a Statement of Response dated 10th March 2017, wherein it denied the Claimant's cause of action, and entitlement to the reliefs she has sought. The Respondent also filed a counter-claim against the Claimant for; special damages of Kshs. 4,566.95, costs of the suit; interest; and any other relief that the court may deem fit and just to grant.
3. The Claimant filed a reply to the Respondent's response & counterclaim on the 11th March 2017, at the close of pleadings this matter got ripe for hearing interpartes on merit. The Claimant's case was heard on the 2nd December 2021, while the Respondent's was on the 8th March 2022.

The Claimant's Case

4. The claimant urged this Court to adopt her witness statement dated 9th January 2017 as her evidence in chief, and admit the documents that she had filed herein under the list of documents of the even date as her documentary evidence. As there was no opposition from the Respondent the Court so adopted and admitted respectively.
5. The Claimant stated that she was employed by the Respondent in 2005 to work in its cutting section at an agreed daily wage of Kshs. 596/-. She worked 6 days a week between 7:00am to 3:30pm. She states that she served the respondent with due diligence during her tenure which was cut short on 20th April 2016 when she was dismissed following allegations by her supervisor that she was not working according to instructions.
6. She contended that on the said day of termination, she and some of her colleagues were called to the office of the director of the Respondent company whereat they were told that they had not been working to the expectation of the Respondent. On account this they were told to write resignation letters as a precondition for them getting paid their dues. She and her colleagues refused to accede to the demand of writing a resignation letter, and this prompted the director to send them packing.
7. The Claimant stated that therefore she didn't leave her employment with the Respondent voluntarily but she was forced to by the Respondent's director. She stated further that prior to the termination she was not given a 30 days' notice and that she was not subjected to any disciplinary process by the Respondent.
8. She was neither issued with a notice to show cause as to why she should not be dismissed nor was she offered an opportunity to be heard. The dismissal therefore was unlawful and in violation of her Constitutional rights.
9. The Respondent neglected and or refused to issue her with a certificate of service. The Claimant further stated that the Respondent didn't pay her termination dues, and the latter has not called her to pick any.
10. The Claimant further avows that the respondent did not provide her with a written contract of service as the same was made orally and by conduct. She also states that she was not given an opportunity to proceed for her annual leave at any time in the course of her employment.
11. In her evidence under cross examination, the witness stated that she all through, she carried out her duties diligently. However, shown the warning letters, dated 11th September 2015, 15th January 2016, and 18th April 2018, being part of the Respondent's documents, she acknowledged that her signature obtains thereon, but alleged that she didn't understand the contents of the document when she appended her signature. Too shown the various contracts of employment that the Respondent had presented to court, the witness acknowledged having executed them, but again contended that she didn't understand the contents thereof.



12. The witness stated that the Respondent never used to make her NSSF remittances to the relevant authority.
13. Cross examined on her claim for overtime compensation, the Claimant asserted that though her pay slip has an item for overtime, the same didn't apply to the half hour that she worked overtime daily.
14. The Claimant stated that it was not within her knowledge that money was paid to the Labour officer for onward transmission to her.
15. In her evidence in re-examination, the Claimant asserted that she would be given documents to sign, with a threat of dismissal hanging on her head if she were to decline to. That is how she ended up signing those documents she was being referred to.

Respondent's case

16. The Respondent presented two witnesses to testify on its behalf. The first witness to testify as such was Veronica Wanza Kathyindi [Rw1]. The witness asked the Court to adopt her witness statement as her evidence in chief and the documents the Respondent filed herein admitted as the Respondent's documentary evidence. The witness presented herself to court as the General supervisor of the Respondent.
17. The witness stated that on or about the 1st March 2016, the Respondent entered into a contract of employment with the Claimant at a daily pay of Kshs. 596.50. The amount was inclusive of house allowance. The pay will be made at the end of every week. The contract was to lapse on the 29th April 2016.
18. It was asserted by the witness that prior to the execution of this stated contract, the Respondent had since the year 2008, entered into various periodical agreements.
19. The Claimant was placed in the numbering section where her work was to number parts of shirts that had come out of the cutting section for stitching. The Claimant's tenure was characterized as characterized by indiscipline on her part. She had a habit of reporting to work late after her lunch breaks, absconding duty, and failing to take by her seniors. Despite warnings, the Claimant failed to change.
20. The witness stated that on the 20th April 2016, in the course of her duty she noted that the Claimant and one of her colleagues were performing their roles slowly and she got prompted to report the matter to her immediate supervisor, Mr. Ketul. They were consequently summoned to his office, they were asked to give a written explanation they refused but instead expressed their desire to leave. They were given a voucher to sign acknowledgement of the dues that they were owed, they refused to sign.
21. The witness asserted that the Claimant absconded duty on the 20th April 2016, at around 3 pm when he was served with a warning letter receipt of which she refused to acknowledge by signing.
22. The Respondent later on came to learn from the Labour Officer, that the Claimant and her colleague had lodged a complaint with his office.
23. Under cover of a letter dated 29th April 2016, the Respondent deposited Kshs. 3,964.90 with the Labour Office for transmission to the Claimant, as according to it, that was the amount due and owing to her as at the time of separation.
24. Through a letter dated 3rd May 2016, the Director of the respondent company was invited to a conciliation meeting which he consequently attended. At the meeting the Claimant refused to take the above stated sum, and return to work.



25. The respondent maintains that it needed not to adopt any procedure or practice with regard to the claimant's dismissal as she had absconded duty and that any entreaties to have her return were ignored. In addition, it states that it upheld its duty as an employer by entering into several written contracts of service with the claimant from 2008 to 2016 which contracts commenced and expired periodically.
26. As for leave, the respondent avers that in lieu of granting leave, it paid the claimant at the end and expiry of every contract period for leave days accruing for the whole period served by each contract.
27. The Claimant didn't give the Respondent one week notice as per the contract or make a payment in lieu of notice. This informs the Respondent's Counterclaim for Kshs. 4,566.95.
28. Cross examined by counsel for the Claimant, that before March 2016, the Respondent had had several contracts with the Claimant, the were yearly or sometimes for shorter periods depending on availability of work.
29. On the 20th April 2016, when the Claimant and her colleague were being told to write the letter to explain their slow work, the witness was present in the office of Mr. Ketul. It is when they refused to write the explanation letter that Mr. Kitul asked them to sign the vouchers. They were never asked to write any resignation letter.
30. The Respondent received a letter from the Labour Officer. In the letter, the Lasbour Officer expressed that the complaint that had been lodged with his office was on unfair termination. The Respondent, through its letter dated 29th 2016, responded to the Labour Officer's letter but in the response never denied that the Claimant and her Colleague had been dismissed.
31. The Respondent didn't write to her any letter requiring her to get back to work, or enquiring why she was not reporting to work.
32. She asserted that the weekly salary pay was inclusive of leave allowance.
33. All her terminal dues were forwarded to the labour officer for transmission to her. She refused to pick the same.
34. The 2nd witness was Mr. Benjamin Matata [RW2]. He adopted the contents of his witness statement herein filed dated 8th May 2018 as his evidence in chief. This witness stated that on the material day, he witnessed the Claimant and her colleague refuse to write a letter as directed by Mr. Ketul. And at around 2pm when they were given a warning letter they refused to sign on the same and instead worked left the factory.

Claimant's Submissions

35. The Claimant's Counsel submitted that an unfair termination occurs where the employment of an employee is brought to an end without a valid and fair reason and without following a fair procedure. To support this argument reliance was placed on the case of *David Kipkosgei Muttai vs Greens Palms Academy* (2014) eKLR.
36. That the response by the Respondent to the labour officer's letter, leaves a clear impression that the employment of the Claimant was terminated, and that being so then the Respondent was obligated under Section 43 of the *Employment Act* to demonstrate to court the reason for the termination and go further ahead to establish that the termination was on a valid and fair reason. The Respondent didn't discharge any of the two burdens.



37. The evidence on record shows that the Claimant was not issued with any show cause letter. She was not invited to any disciplinary hearing. She was not given a chance to be heard. All this was contrary to the provisions of section 41 of the Act, the termination was procedurally unfair therefore.
38. It was argued that it is the director of the Respondent who was at the centre of matters relating to the termination of the but he deliberately avoided to present himself as a witness to avoid cross examination.
39. It was argued further that the Respondent's allegation that the Claimant deserted duty doesn't hold sway. In order for an employer to succeed in an allegation that his or her employee deserted duty and therefor there was a valid reason for termination of that employee's employment, the employer must establish that notice was issued to the employee to show cause why he or she shouldn't be terminated on account to the desertion. To buttress this point, reliance was placed on the decision in *Gerald Maku Mwangi vs Njuca Consolidated Co.Ltd* (2018) eKLR. As the Respondent didn't prove this, the termination of the Claimant's employment should be held unfair.
40. She concluded that having proven that her termination was unfair, the court ought to find in her favour and award her the prayers as sought.

Respondent's submissions

41. The respondent maintained that the claimant had indeed absconded duty. It urged the court to find that the claimant is not entitled to any of the reliefs sought as she had not proved unfair termination on a balance of probability and as such, she is not entitled to any compensation. It however added that should the court find that her termination was indeed unfair, three months compensation to her would be sufficient.
42. On its counter-claim, the respondent urged the court to uphold the sanctity of legally binding agreements and find that the claimant was in breach of the terms of the employment contract.
43. In conclusion, it urged the court to find that the claim in its entirety is frivolous and merely a fishing expedition and to dismiss it with costs thereon and the counterclaim be allowed as prayed.

Analysis and Determination

44. From the pleadings by the parties and their evidence in support of their respective cases, the following issues commend themselves for determination;
 - A]. How did the employment relationship between the Claimant and the Respondent come to determination?
 - B]. If the answer to [a] above is to the effect that it was terminated by the Respondent, was the termination fair?
 - C]. Whether the Claimant is entitled to the reliefs sought or any of them.

Of how the employment relationship between the Respondent and Claimant determined.

45. The party's protagonists herein took positions that were diametrically opposite as regards how the Claimant's employment came to an end. The Claimant contended that the director of the Respondent company terminated her employment verbally, while the Respondent on the other hand asserted that the Claimant deserted duty.



46. The director of the Respondent company Mr. Ketul was at the centre of the events that were immediate to the departure of the Claimant from employment on the material day. From the evidence of both the Claimant and the Respondent's witnesses, it is clear that immediately before the Claimant left the factory on the separation day, there was a meeting between the director and the Claimant, where the director sought to handle an alleged misconduct on the part of the latter. Inexplicably, the director opted not to testify in this matter, ordinarily one would expect him to, considering the circumstances of the matter.
47. This Court is inclined to draw an adverse inference against the Respondent, to the effect that had the director testified his evidence would have been prejudicial to its case. The court was denied the evidence of a material witness. The Claimant's evidence on the events of the material day was neither shaken in cross examination nor rebutted by the evidence that was brought forth by the Respondent's witnesses.
48. By reason of the premise[s] above, I am persuaded to take the Claimant's evidence on the happenings of the material time as the true account. Consequently, the Court concludes that the Claimant's employment was terminated verbally by the director of the Respondent.
49. A termination of employment occurs by an overt act on the part of an employer signifying that the relationship no longer or shall no longer subsist. The Respondent's purported computation of the Claimant's terminal dues, and requiring her to execute a discharge voucher was such an act.

Whether the termination was fair.

50. Under the provisions of section 47[5] it behooves an employee to prove that the termination was unfair or that a dismissal was wrongful. In [*Kennedy Maina Mirera v Barclays Bank of Kenya Limited*](#) [2018]eKLR the Court state;
 - “ 19. Therefore, the plaintiff must adduce prima facie evidence that tends to show that his employment was not terminated for a valid reason and that the employer did not follow a fair procedure in terminating his employment. Once the Claimant presents prima facie evidence to that effect, the burden shifts to the employer to rebut that evidence by demonstrating that he /she had a valid reason to terminate the employment and that in effecting the termination, a fair procedure was followed”
51. By reason of the premises hereinabove, I find that the Claimant did adduce prima facie showing that the termination was unfair.
52. The Claimant having discharged her legal burden under this provision of the law, it fell upon the Respondent to demonstrate that it had a valid reason to terminate the employment and that it adhered to fair procedure. The burden under this section is successfully discharged by an employer by him/her adducing sufficient evidence to rebut the employee's that was in making the prima facie case.
53. The Claimant contended that her employment was terminated without her being given a chance to defend herself against the accusations that had been levelled against her by the supervisor. Section 41 of the [*Employment Act*](#) provides the fountain head for procedural fairness in matters termination of an employee's employment or dismissal of an employee. The procedure encapsulated thereunder is mandatory and non-adherence to the same renders a termination or dismissal unfair pursuant to the provisions of Section 45 of the Act.



54. In the totality of the evidence that was brought before this Court through its two witness no piece of it got targeted towards establishing that the termination was procedurally fair, in rebuttal of the Claimant's evidence.
55. Even if we were to assume for a moment that the termination of the Claimant's employment was on account of desertion as alleged by the Respondent, still it had an obligation to demonstrate to this court that there was adherence to procedural fairness entailing notifying the Claimant that it intended to terminate her employment on the account of desertion, allow her make representations on the ground[s], then consider the representations before making a decision.
56. In the upshot, I find that the Respondent failed to establish that the termination was procedurally fair.
57. Under section 43 and 45[2] the Respondent had twin burdens to bear and discharge, to prove the reason or reasons for the termination and to demonstrate that the same were valid and fair. Having found as I have hereinabove that the termination was not on account of desertion as was alleged by the Respondent but a verbal one as a result of the Claimant's refusal to write and sign a resignation letter, I conclude without hesitation that the Respondent failed to prove the reason for the termination, and that the same was valid and fair. The termination was not substantively fair therefore.

Of the Reliefs

58. The employment contract between the Respondent and the Claimant was one in character that was terminable by a 28 [twenty-eight] days' notice under the provisions of section 35 of the [Employment Act, 2007](#). There is no doubt that the notice was not issued. This entitles the Claimant to one month's salary pay in lieu of notice under section 36. The Claimant is hereby granted one month's salary in lieu of notice, Kshs.15,496.
59. The Claimant sought for compensation for half hour she worked overtime daily for the eleven years she worked for the Respondent. It is imperative to state that the claim under this head as coached by the Claimant is in total ignorance of the provisions of section 90 of the [Employment Act, 2007](#), which deals with limitation of time. This court can only make an award under this head for the period three years immediately before the date of termination. The Claimant's evidence that she used to work as hereinabove stated was not challenged at all. I award her Kshs. 34,977.75, being compensation for the overtime worked.
60. The Claimant was registered and a member of the NSSF scheme, pursuant to the provisions of section 35 [5] of the [Employment Act](#), she cannot benefit under service pay.
61. The Claimant didn't challenge the documentary evidence by the Respondent which indicate that she used to proceed for leave, at the production of the documents the evidential burden shifted to her. She did not discharge the same therefore. In fact, in the circumstance, the Claimant was expected to be specific on the months when she did not proceed for leave.
62. An award of the compensatory relief under section 49[1][c] of the [Employment Act](#) is discretionary dependent on the circumstances of each case. The extent of the award too. This Court has carefully considered the manner how the Claimant's employment was terminated, the lack of care on the part of the Respondent to adhere to procedural fairness and have the decision anchored on a substantive justification, the length of time that she served the Respondent, and conclude that she is entitled to a compensatory award and to the extent of 6 months' gross salary, Kshs. 92,976.
63. Having found that the Claimant's employment was terminated by the Respondent, the latter's counterclaim which was grounded on the fact that she absconded duty, must fail.



64. In the upshot, judgement is hereby entered for the Claimant in the following terms;
- A]. A declaration that the Claimant's employment was procedurally and substantively unfair.
 - B]. One month's salary in lieu of notice, Kshs.15,496.
 - C]. Compensation for overtime worked, Kshs.34,977.75
 - D]. Compensation pursuant to section 49[1][c] of the *Employment Act*, 2007, Kshs. 92,976.
 - E]. Costs
 - F]. Interest on [b], [c], and [d] at court rates from the date of filing this suit till full payment.

READ, DELIVERED AND SIGNED THIS 30TH DAY OF JUNE 2022.

OCHARO KEBIRA

JUDGE

In Presence of

..... For Claimant

..... For Respondent

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 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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

