



**Thumbi v Sparkling Clean Services Ltd (Cause 1093 of 2016)
[2022] KEELRC 1476 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1476 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1093 OF 2016
AN MWAURE, J
JUNE 30, 2022**

BETWEEN

FLORENCE WANGU THUMBI CLAIMANT

AND

SPARKLING CLEAN SERVICES LTD RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on the June 8, 2016 through the firm of Mbigi Njuguna & Co Advocates. The respondent filed the Response to the claim on the 25/08/2016 through the firm of Kitheka & Co Advocates.
2. In the claim, the claimant is praying for judgment against the respondent for:-
 - a. Payment of a month full salary in lieu of notice.....Ksh 10,030/-.
 - b. Service pays for 3 years when the NSSF contributions were not made Ksh 15,045/=
 - c. Pro rata leave days for 9 years (at rate of 18 days) Ksh 60434.46/-
 - d. Unpaid Housing Allowance for 8 years, 4 months from 2007. (100 months at rate of 15 % of minimum wage for every month worked). Ksh 164,325
 - e. 12 months' pay for unfair termination Ksh 120,360/=

The Claim

3. The claimant says she was employed by the respondent as a cleaner on the August 22, 2006 earning a gross salary of Ksh 10,030. She was a cleaner for approximately nine years from August 22, 2006 to December 31, 2015 before being unfairly terminated



4. On the January 13, 2016, the County Labour Office of Nairobi directed the respondent to pay the claimant all her benefits but the respondent neglected and refused to pay the claimant. On the January 21, 2016, the County Labour Office of Nairobi directed the respondent to attend joint conciliation meeting to discuss the matter which was scheduled on the January 28, 2016 at 10.00 am which the respondent failed to attend. The respondent's did not also comply with the Kenya Human Rights Commission letter dated the February 9, 2016 requesting them to pay the claimant after failing to attend the various meetings.
5. The respondent says that it did not dismiss the claimant unfairly as alleged. They say that the claimant did not file the case in good faith and the respondent is ready and willing to pay the claimant her rightful dues. It has prayed that the claim be dismissed with costs.
6. The claimant Florence Wangu Thumbi gave sworn testimony. She said she used to work with the respondent but is currently jobless. She adopted her witness statement dated 17/5/2016 as evidence in chief. She also produced the documents in the list dated the May 17, 2016 as exhibits 1-10. She also produced some other documents dated July 23, 2016 adopted as part of her exhibits.
7. On cross examination, claimant said that the certificate of service indicates she was employed by the respondent. She was employed in August 2006. She says that on the 31/12/2015 she did not go to work as she was told there was no work. They were to go back to work in January 2016. On the 13/1/2016 she was asked to return company assets and uniform and was told there was no work anymore. She states that there were many of her colleagues who were told there was no work.
8. Claimant says she has pending leave days for 9 years. The claimant further states she was informed there was no more work but was not told the respondents contract with NHIF where she was cleaning had come to an end.

Respondent's Case

9. The respondent witness Nancy Wambua Kamau gave sworn testimony. She said she is a Manager at the respondent's organization. She adopted her statement dated 3/9/2020 as her evidence in chief. She also adopted the extracts from the staff records alongside other documents in the witness statement.
10. On cross-examination she said that the claimant worked on contract up to 2015 and would be renewed if there was new client. If there was no new client, they would take a break. The witness says the claimant's last contract was between 1 April 5, 2013 to December 31, 2015.
11. The respondent further says that the employees used to take 21 leave days but not all together. She produced the records for leave days taken by the claimant.
12. It is the Respondent's evidence that after December 2015 she did not recall the Claimant because she brought a letter from the Ministry of Labour demanding her dues. She received two letters from the Labour Office which the Respondent responded to. She says that they were asked to issue a cheque to the Claimant which they did.
13. The respondent witness says that they did not respond to the letter from the Kenya Human Rights Commission as they were already dealing with the labour office. The respondent says they gave the cheque to the Labour office but later learnt the claimant declined to take it and was returned to the respondents by the labour office.
14. It is the respondent's evidence that the claimant absconded from duty and then went to the labour office and was supposed to come back and check for work but did not.



15. On re-examination, she said that she responded to the letter by the labour office dated 13/1/2016 and complied with the calculations as advised by the labour officer.

Submissions

16. The Claimant testified that no reason or notice was given by the Respondent for the action of termination. The Claimant faults the Respondent witness testimony that the Claimant was not terminated but was awaiting the date of signing a new contract and that it was upon the Claimant to keep visiting their offices. The Claimant submits it was unreasonable to expect her whereas she was jobless to keep visiting their offices.
17. The Respondent indicated that a new contract was being prepared and the Claimant was due to sign but she did not say when the contract could be ready. The Claimant further urged the court to disregard what the Respondent produced in court as the Labour Officer's computation as it was a rough draft and they seem not to have been at the meeting as the Claimant was always there.
18. The respondent never produced any evidence in court to show that the claimant was employed on a fixed term contract. The claimant urged the court to look at the circumstances of December 31, 2015 and hold that it was constructive dismissal from work. Further claimant submits that it was evident that the contract of service clearly had been terminated. The burden rests on the respondent to prove that the contract had ended by effluxion of time and no such evidence has been presented.
19. Failure of the respondent to produce contracts for the years the claimant has worked suggests that she had a running contract of service.
20. On the remedies, the claimant relied on the case of *Co-operative Bank of Kenya Limited versus Banking Insurance & Finance Union (Kenya)* (Civil Appeal 240 of 2018) (2021) KECA 173 (KLR) (Employment & Labour) (5 November 2021) (Judgment) where the Court observed that:-

“some of the factors to consider when awarding maximum compensation for unfair termination is the impracticability of reinstatement due to time lapse since dismissal, the relationship between the employer and employee having been destroyed beyond repair, and the impact on the employee.”
21. The claimant argues that in the present case it is not reasonable to reinstate the claimant considering that their relationship has been irretrievably broken down by the protracted legal battle. Secondly, a period of close to 7 years has elapsed since she was unfairly terminated hence the working environment must have significantly changed. The claimant has not been engaged for 8 years so it is only fair that the court awards maximum compensation. It is thus fair that the court awards 12 months maximum compensation.
22. The claimant argued that she is entitled to service pay for 3 years and pro rata leave for 9 months. Claimant also submits that the respondent did not remit the NSSF deductions for the period that the claimant worked for them. There is no material placed before court that the respondent made remittances for the entire period. In the circumstances, the claimant claims she is entitled to service pay for 9 years.
23. The claimant also submits that she did not utilize her leave days as she was always engaged in duty. She was sick during the period the respondent says she utilized her leave days. The respondent did not tender any evidence to show she took her leave days from August 2006 to 2013. The claimant says it is respondent's obligation under section 10(6) and (7) of the *Employment Act* to keep records and that any time it fails to produce written contract or particulars prescribed the burden should be on it



to prove or disapprove. It is the Respondent who ought to have produced documents to indicate the leave days that the claimant took for the period she served.

24. The claimant relied on the case of *Abigael Jepkosgei Yator & Another versus China Hanan International Co Ltd* 2018 ECLR for the proposition that an employer should keep all work records for a period of 5 years even where employment has ceased as such records may become necessary and important particularly in proceedings such as these. Where legal proceedings are initiated by an employee, the law places the duty to produce the work records upon the employer. The Claimant contends that where work records are not produced, any claim made by an employee must be taken as an absolute truth.

Respondent's Written Submissions

25. The respondent contends it did not terminate the claimant as alleged. the claimant did not report for work in January 2016 and instead she reported a dispute, hardly two weeks into the month to the labour office. No letter of terminating the claimant's services has been produced. The claimant has not accused the Manager, of having stopped her from her employment.
26. The respondent relied on the cases of *Maawiya Ali Abdala T/A South Coast Paint & Hardware versus Bongo Mwamwero Ngome* (2022) eCLR and *Claire Vike versus Alexandria Cancer Centre & Palliative Care Hospital* (2018) eCLR to advance the contention that there was desertion following the claimant's act of leaving her place of work.
27. On the prayer for service pay, the respondent contends that the claimant did not tender any evidence in this regard. The claimant's list of documents shows that the respondent had made the contributions upto December 31, 2015, the last day the claimant worked. the period of 3 years the claimant is asking for is not established in her evidence hence the court ought to dismiss the prayer.
28. With regard to leave days, the claimant was not clear as to the period or how she had computed leave days. On the other hand, the respondent produced all the records of all the employees both before the labour officer and as an exhibit in court. The records show that there were no outstanding leave days as on December 31, 2015. The claimant had exhausted her leave days.
29. As regards the house allowance payable, the respondent admits it owed the claimant but had been willing to pay the sum owed amounting to Kshs 54,539. The claimant has not faulted the calculations of house allowance as done by the Labour Officer. The respondent's cheque was availed to the claimant but she declined it.

Issues for Determination

- a. Whether the claimant was unfairly dismissed.
- b. The Remedies, if any, the claimant is entitled to
30. Section 45 (1) and (2) of the *Employment Act* 2007 provides that—
- (1) No employer shall terminate the employment of an employee unfairly.
- (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 employee's 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.”
31. Section 47(1) (5) of the *Employment Act* 2007 provides that
- “For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
32. In *Naima Khamis v Oxford University Press (EA) Limited* [2017] eKLR, the Court of Appeal said that –
- “On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also section 45(2)(c) requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.”
33. Similarly, Ndolo J in *Walter Ogal Anuro versus Teachers Service Commission* 2013 eKLR held that,
- “However, for a termination of employee to pass the fairness test it must be shown there was not only substantive justification but also procedural fairness”.
34. In the present claim there are unfortunately no employment records from the employer that would have greatly assisted the court in the determination of the issue before court. The claimant in cross examination did admit though that she was a casual worker and would work when there was work available.
35. The court considers it significant that in the letter from the respondent dated January 17, 2016 which is a response to the earlier letter from the Labour Officer, the Respondent is categorical that the claimant was not dismissed and that it was still open to her to go back and resume work following the signing of a new contract. This letter was indeed received by the labour office on the January 20, 2016 which for reasons which are unclear wrote another letter to the Respondent saying that it had neither responded or settled the case. This was not the correct position since the Respondent had responded.
36. There is no evidence that the claimant was terminated from employment by the respondent. She says she was told to return the respondent’s uniform by December 31, 2015 and it is noteworthy that by January 13, 2016 the labour office had already written to the respondent. By 17th January 2016 the respondent had written to the labour office and confirmed they had not terminated the claimant’s employment. They informed the labour office that it was the claimant who absented herself from work and they asked her to report back to work and continue with her duties. They again responded and wrote to the labour office on January 21, 2016. Clearly this was not in keeping with an employee who was planning to terminate their employment.



37. There is no evidence from the claimant or the labour office that the claimant responded to the respondent's offer for her to go and sign the contract and resume work. There is no evidence as well that the said letters by the respondent were fake. The court with the support of the case of Maniya All Abdala T/a South Coast PaInt Hardware vs Bongo Mwamwero Ngume Appeal No 071 of 2021 the Court observed:-

“Thus there is no reason to disregard the Appellant's case and account for voluntary desertion of duty by the Respondent characterised with the respondent's total disconnection to be out of the appellant's reach, the material on record establishing unnatural employee behaviour on the part of the respondent...”

In this case similarly there is no proof that the respondent unlawfully terminated the claimant's employment. Rather the Claimant was given an opportunity to go sign another contract but did not do so.

38. The case before me does not demonstrate the claimant was keen to report to work come the New Year. For whatever motivation she had kept away from work even when the Respondent wrote to her through the labour office to go back to work.

39. Section 47(5) of the Employment Act provides that for any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

40. The claimant has not proved the respondent terminated her employment unlawfully and unfairly. I find no case for unfair termination of employment within the provisions of sections 45(1) of the Employment Act 2007 and section 41 of the same Act.

41. The claimant is nevertheless entitled to her dues that notwithstanding as follows:-

- a. Payment of one month in lieu of notice is declined as unfair termination has not been proved.
- b. Service pay is awarded as respondent did not provide documents to demonstrate they used to remit the same in 2006-2008 but produced for 2009-2015 and so Kshs. 15,045/- is awarded.
- c. Leave days- there are records to evidence Claimant took her leave days. Same is declined.
- d. Unpaid house allowance is allowed as advised by the Ministry of Labour amounting to Kshs 54,541/-.
- e. Compensation for unfair termination is not proved and is declined.
- f. The claimant having worked consistently for the Respondent for approximately nine years it is fair to order each party to bear their costs.
- g. Interest is awarded at court rates from date of Judgment till full payment and final dues is Kshs 69,580/-.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 30TH DAY OF JUNE, 2022.

ANNA NGIBUINI MWAURE

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 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.

ANNA NGIBUINI MWAURE

JUDGE

