



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Maina v Directline Assurance (Cause 649 of 2016)  
[2022] KEELRC 1399 (KLR) (27 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1399 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 649 OF 2016  
K OCHARO, J  
JUNE 27, 2022**

**BETWEEN**

**LAWRENCE MAINA ..... CLAIMANT**

**AND**

**DIRECTLINE ASSURANCE ..... RESPONDENT**

**JUDGMENT**

1. The claim herein was instituted vide a memorandum of claim dated August 22, 2016 wherein the claimant sought the following reliefs:
  - a. Breach of contract (Kshs. 23,000 PM x 27 months) Kshs. 621,000/-
  - b. 12 months' salary as damages for unfair termination (12 months x 23,000) Kshs. 276,000/-
  - c. Unpaid house allowance (Kshs. 3,450 x 36 months) Kshs. 124,200/-
  - d. Gratuity/severance (Kshs. 23,000/26 x 15 days x 3 years) Kshs. 39,808/-
  - e. General Damages for discrimination
  - f. Interest on a), b), c), d) and e) at court rates from the days each payment fell due and payable until payment in full.
  - g. Costs of this suit.
2. The claimant anchors his case and the reliefs afore stated on the prime fact that he at all material times was an employee of the Respondent whose employment was terminated unfairly and without any justifiable cause.



3. The respondent filed a statement of response dated May 19, 2016. In it, it denies all allegations brought forth by the claimant and states that the claimant's employment was terminated on account of a justifiable cause, he willingly neglected to perform his core duties.

#### **Claimant's case**

4. The claimant's case was taken on the 9<sup>th</sup> of November 2021. He urged the court to adopt his witness statement dated April 18, 2016, as his evidence in chief and the documents that he filed contemporaneously with the statement as his documentary evidence. The adoption was done without any objection by the Respondent.
5. It was his case that before he joined the workforce of the respondent Company, he was working in the law firm of Kairu and McCourt Advocates as an Assistant Records Clerk, and as at January 2013, his salary at the law firm was Kshs. 30,000. On the February 1, 2014, he transferred his services to the respondent company, in the same capacity and with a salary of Kshs. 23,000. It was agreed as between him and the respondent that the salary was to be reviewed upwards within a period of three months, to be in harmony with what he was earning while in the employment of his former employer, and that which employees of his rank were earning . In breach of this understanding, the respondent failed to review the salary.
6. His employment by the respondent was under a fixed term contract of three years, commencing February 1, 2014 with the appointed lapse date being, January 31, 2017.
7. The claimant stated that on the June 2, 2014, he took up the matter of his salary review with the respondent's Human Resource Manager. She gave him an assurance that the issue was being attended to, and that the salary was to be reviewed in accord with the agreement, to be in line with what the other employees of his rank were earning. Despite the assurance and the many follow-ups by the claimant the review never came through. On the October 3, 2014, he got constrained to approach the claims Manager with the issue, and to his surprise, he realised that the latter had never been briefed of the same.
8. On the October 21, 2014, he was issued with a show cause letter. Therein he was accused of incompetence and habitual late coming. The complainant was one Mary Thumbi, a member of his team. He stated further that he was given one hour to respond to the show cause letter, notwithstanding the short notice, he complied.
9. The claimant stated further that at around 2:00 pm of same day, a disciplinary committee was constituted which comprised in membership, the Human Resource Manager, the Claims Manager, and the Registry Manager who was also one of his accusers. At the meeting he was informed that the registry manager had complained that he never followed his instructions and that he habitually reported to work. He denied the allegations, and sought to be allowed to call his colleagues to testify in support of his defence but the plea was not allowed. He also sought that Mary Thumbi be availed to testify before the Committee, the plea was also met with rejection.
10. The claimant asserted that the disciplinary panel was not properly constituted as the Human Resource and Administration Manager did not have a valid practicing certificate at the time and therefore not qualified to practice. Further that there was no representation from the department under which he was working given that the departmental Head was one of the complainants.
11. He stated that a decision to terminate his employment was without any notice or valid reason totally disregarding the procedure set out in the law. In addition, he maintains that he was never issued with a warning letter and was discriminated against by the Respondent by paying him a salary that was less than that of his peers.



12. Cross examined by counsel for the respondent, the claimant stated that the contract of employment was a fixed term contract, with a monthly salary of Kshs. 23,000. That when he took up the job with the respondent, he sought for the salary increment verbally.
13. He was served with a show cause letter on the October 21, 2014. He responded to the same, he didn't tender the response before court for the reason that it was given to the Human Resource Manager.
14. In his evidence under re-examination, the witness stated that he was issued with a certificate of service which shows his period of service as 1October 5, 2011 to October 23, 2014.
15. The claimant presented two witnesses to testify in fortification of his case, the first one to testify was Enock Kibathi [CW2]. The witness did adopt his witness statement dated April 19, 2019, as his evidence in chief. The second witness was Harrison Mbui[ CW3], who equally urged the Court to adopt his witness statement as his evidence in chief.
16. The evidence of these witnesses was largely to the effect in support of the claimant's case on the procedure that was adopted by the respondent to terminate his employment as they were equally subjected to the same. The witnesses were not cross examined by counsel for the respondent.

### **Respondent's case**

17. The respondent, presented one witness to testify in support of its defence against the claimant's case, Ms. Lilian Ouko, its Human Resource Manager. The witness placed reliance on her witness statement as her evidence in chief, and moved the court to adopt the respondent's documents filed herein under the list of documents dated August 6, 2019 as its exhibits.
18. The witness stated that the claimant was employed by the respondent on the February 1, 2014 for a tenure of Three years as an assistant records Clerk. The contract was terminable with a Thirty [30] days' notice. The consolidated monthly salary was KShs. 23,000. The contract of employment between the Claimant and the Respondent did not have any provision on review of the salary to KShs. 30,000/- as claimed by the claimant nor was there a promise for the review.
19. The respondent and the law firm are two separate entities and that the claimant's contract with the latter had no connection with the respondent.
20. The witness confirmed that the claimant was indeed issued with a notice to show cause on October 21, 2014 following complaints that were made against him. That through a letter of the same day, the claimant resigned. The resignation was accepted by the Respondent through a letter dated October 21, 2014. The respondent waived the 30 days' notice and paid the him one-month salary in lieu of notice. It was maintained that the claimant resigned out his own free will and without any coercion and duress from it.
21. The witness stated that the claimant's dues were duly computed, and by cheque, he was paid Kshs. 31,037/-. Consequently, he signed a discharge voucher dated October 27, 2014
22. In her evidence under cross examination the witness stated that the claimant used to work with the law firm, law firm which was offering the respondent legal services, before he got employed by the Respondent on the February 1, 2015 as a registry clerk.
23. She alleged that the claimant resigned from employment, through a letter dated October 21, 2015. She acknowledged that the date of the letter has an alteration.



## Claimant's Submissions

24. Counsel for the claimant submitted on whether the claimant was dismissed from employment or he resigned. He argued that the evidence by the respondent's witness ran counter the respondent's pleadings. The pleadings are in the tone that, the claimant was issued with a show cause letter, a disciplinary committee was constituted, the claimant was heard before the committee, a decision to dismiss him made and a termination letter issued. Parties are bound by their pleadings and any evidence which is at variance with the pleadings should be for rejection. To buttress this point, counsel cited the case of in *Independent Electoral and Boundaries Commission & Anor. Vs. Stephen Mutinda Mule & 3 others* [2014] eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oledoji vs Nigeria Breweries PLC SC 91/2002*, where Adereji JSC expressed himself on the importance and place of pleadings, thus;

“..... it is now trite principle in law that the parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.

..... In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

25. It was submitted that the respondent produced the resignation letter that he had been forced to write in order for him to get his dues. The letter is clear that it was written on the 27<sup>th</sup> day of October 2014, yet the termination letter and the certificate of service all indicate that his employment was terminated on the 21<sup>st</sup> day of October 2014.
26. The evidence of the claimant's two witnesses on the fact that after their employment contracts were terminated and letters of termination issued, they were instructed to return the letters and write resignation letters as a pre-condition for payment of terminal dues, which evidence was collaborative of the claimant's, was not challenged at all by the respondent. Consequently, this amounted to an admission of the same by the respondent.
27. On whether his dismissal was unfair, the claimant submitted that under sections 43, 45 and 47(5) of the *Employment Act*, the burden of proving the reasons for the dismissal lies with the employer. He argued that at the hearing, the respondent's witness's testimony fell short of discharging the burden. He placed reliance on the case of *Jared O. Otete vs Factory Guards Limited* (2014) eKLR.
28. The claimant concluded that he had proved his case on a balance of probabilities and as such, he urged the court to grant him the orders sought.

## Respondent's submissions

29. The respondent submitted that the claimant voluntarily resigned from employment, through his letter dated October 21, 2014. The respondent through its witness was able to establish this.
30. The respondent argued that by dint of the provisions of section 45[3] of the *Employment Act*, the claimant having not worked for a period of more than thirteen months, is estopped from agitating a claim for unfair termination.



31. In response to the claimant's claim for, and submissions on, breach of contract, it was argued that the claimant having caused determination of his employment through a resignation it cannot be available to him to contend that there was a breach of contract. In view of the provisions of section 49[1][c], the claimant cannot be awarded compensation for the remainder of his contract period, 27 months. Reliance was placed on the case of *Andrew Gachuba v National Oil Corporation of Kenya* [2018]eKLR.
32. Further, it argued that the claim for the unexpired term is one based on anticipatory earnings which is not anchored in law as was held by the Court of Appeal in *D.K. Njagi Marete vs Teachers Service Commission* (2020) eKLR.
33. The respondent also submitted that by virtue of section 35 of the *Employment Act*, the claimant is not entitled to gratuity. He was a member of a pension scheme operated by it and the National Social Security Fund. It also placed reliance on the case of *Elijah Kipkoros Tonui vs Ngara Opticians TA Bright Eyes Limited* (2014) eKLR.
34. The respondent maintained that the prayer for house allowance ought to be dismissed for lack of merit because as per the contract of employment, it was not obligated to provide the same to the claimant. Regarding the prayer for general damages for discrimination, the respondent submitted that the claimant failed to prove that he was entitled to the relief.

### **Analysis & Determination**

35. The following broad issues commend themselves for determination in this matter, thus;
  - [a] Whether the claimant's claim is well anchored considering the provisions of section 45[3] of the *Employment Act*.
  - [b] Did the claimant's employment determine by his resignation of through his dismissal by the respondent?
  - [c] If it was terminated by the respondent, was the termination fair?
  - [d] Is the claimant entitled to the reliefs sought or any of them?

Whether the claimant's claim is well anchored considering the provisions os section 45[3]

36. Counsel for the respondent argued that the claimant's case for unfair termination stands on quick sand. At the time of his termination, he had not worked for the respondent for a period of more than thirteen months. Consequently, the claim is one that was forbidden under the provisions of the aforesaid section of the law. I can only but with due respect state that the argument is in ignorance of the decision in *Samuel G. Momanyi v The Attorney General* [2012]eKLR, which declared the provision unconstitutional.

Of Whether the employment was determined by a resignation by the claimant or his dismissal by the respondent.

37. The parties didn't have a common position on how the employment relationship between them came to an end. In their evidence before the court, they took positions that were diametrically opposite of each other. It is by reason of this premise that this court cannot proceed further without first making a determination as to how the employment was determined. In a situation like is here, the court doesn't become hapless, the pleadings by the parties, comes in handy.
38. It is important to state that the whole purpose of pleadings, be it a statement of claim, defence or reply is to define the issues between the parties, to confine the evidence of the trial to the matters relevant



to those issues, and ensure that the trial proceeds to judgement without either party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from pleadings. Put in another way, a party should know in advance, in broad outline the case he will have to meet at the trial, see *Aristede Marege Nyangau v Lavington Security Limited*, [2021]eKLR.

39. No doubt, numerous judicial attention has been given on the importance of pleadings and the implication on a party's dwelling on matters not pleaded or that cannot be ascertained from its pleadings. The decisions cited by the claimant's counsel in his submissions on this being some of them, and I agree with them.
40. The respondent's witness's evidence in court was to the effect that the claimant voluntarily resigned from employment on the October 21, 2014, through his resignation letter of the even date. I have carefully considered the statement of response dated May 19, 2016, and find no difficulty in stating that the position that was taken by the respondent at hearing and the evidence by the witness was at variance with the pleadings.
41. In the statement of response, the respondent averred;
  12. In further response to paragraph 9 of the statement of claim, the respondent states that the Disciplinary Committee which heard and determined the complaint against the claimant was properly constituted in accordance with the policy of the respondent, the law and the contract.
  13. The respondent denies the contents of paragraph 10 of the statement of claim and puts the claimant to strict proof thereof. And the respondent states as follows:
    - (a) Even if the Human Resource and Administration Manager did not have a valid practicing certificate as alleged, which is denied, that did not invalidate her representation of the respondent's Human Department at the Disciplinary Committee
    - (b) The Departmental Head of the complainant properly sat in the Disciplinary Committee in line with the respondent's policy and the contract.
    - (c) The complainant was not barred from calling his fellow team members to vouch for him at the disciplinary proceedings."
42. The list of documents that was contemporaneously filed with the response to claim in its item 3 mentions a termination letter dated October 21, 2014. The letter was not among those documents that were filed by the respondent in court. I have keenly looked at the resignation letter that the respondent placed before this court, I have no doubt in my mind that the date 27<sup>th</sup> was changed to 21<sup>st</sup> to fit the respondent's narrative. This coupled with the averments in the respondent's pleadings hereinabove brought forth, leads me to a compulsive conclusion that the respondent was not candid on how the separation occurred, and agree with the claimant's evidence that his employment was terminated by the respondent on the October 21, 2014, and the circumstances under which the resignation letter was written. Further, I am convinced that the letter was written on the October 27, 2014.

#### **Whether the termination was fair.**

43. Whenever a court is invited to make a determination regarding fairness of a termination of an employee's contract of service or an employee's dismissal, it behoves the court to pronounce itself on the procedural and substantive fairness aspects of the termination or dismissal. Procedural fairness speaks to the procedure leading to the decision to terminate or dismiss, while substantive fairness, to the decision itself.



44. Section 41 of the *Employment Act* provides for a mandatory procedure that any employer contemplating termination of an employee's employment or dismissal of an employee from employment, must adhere to. The procedure has three components, the notification component- The employer must notify the employee that he or she is contemplating terminating that employee's employment and the grounds upon which the intended action shall be based, The hearing component- the employer shall have to accord the employee an opportunity to make a representation on the intended action and the grounds, Lastly, the consideration component- the employer shall consider the representation made by the employee and or his witness[es] before making a decision to terminate or dismiss.
45. It is the duty of the employer to prove that the procedure was adhered to, in the defaulting, the termination or dismissal shall be deemed unfair in terms of section 45[2] of the *Employment Act*. In this matter, the evidence that the respondent led before this Court was a clear deviation from its pleadings, and consequently that didn't address the procedural fairness in the determination of the claimant's employment. I find that the burden was not discharged, the termination was procedurally unfair.
46. Section 43 of the Act places an obligation on an employer, whenever there is a dispute regarding termination of an employee, to prove the reason [s] for the termination. Section 45 of the Act imposes a further burden on the employer to prove that the reasons were fair and valid. A legal burden can only be discharged by adduction of sufficient evidence. Where a party bearing the burden fails to tender evidence or is blurred from leading evidence on the facts which his/her case is anchored, it cannot be said that he has discharged the burden.
47. Apparently blurred by the turn the respondent took from its pleadings, it failed to place before this court any evidence geared towards establishing that the termination was justified and on a valid and fair reason[s].
48. It was not proved therefore that the termination was justified and on a valid and fair reason[s].  
Whether the Claimant is entitled to the reliefs sought or any of them.
49. The claimant sought inter alia general damages for breach of contract. In support of this claim counsel for the claimant submitted that the respondent should be condemned to pay the claimant an equivalent of for the remainder of the contract period [ 27 months]. That the claimant had a legitimate expectation to work for the full period of the contract but the respondent did unfairly bring it to termination prematurely. This court has said before that currently in the Kenyan situation, the relief such as sought here by the claimant is not awardable.
50. Having found that the termination of the claimant's employment was both substantively and procedurally unfair, and considering the manner in which the respondent terminated the claimant's employment, the substantive deviation from the procedural and substantive requirements by the respondent, the fact that it was not demonstrated that the claimant contributed to the termination, the length of period that the claimant expected to remain in the employment of the claimant, and find that he is entitled to the compensatory relief under section 49[1][c] of the *Employment Act*, to the extent of 7 months' gross salary, Kshs.161,000.
51. The claimant contended that for the entire of those months he was in the employment of the respondent he was not paid house allowance. The Respondent on the other hand asserted that the salary that was agreed on as per the contract of employment, Kshs. 23,000 was an all-inclusive amount. The claimant has not demonstrated that the salary was exclusive of house allowance, for example by showing that the monthly salary that he earned during the material time was below the minimum wages of that time. The entitlement to the relief was not proved.



52. I got considerable difficulty in understanding what informs the claimant's claim for general damages for discrimination. No evidence was led to establish the alleged discrimination. The claim under this head is for rejection.
53. In the upshot, judgement is hereby entered in favour of the claimant in the following terms;
- [a] A declaration that the termination of the claimant's employment was both procedurally and substantively unfair.
  - [b] Compensation pursuant to the provisions of section 49[1][c] of the [Employment Act](#), 7 [seven] months' gross salary, Kshs. 161,000.
  - [c] Interest at court rates from the date of this judgement, till full payment.
  - [d] Costs of this claim.

**READ, SIGNED AND DELIVERED VIRTUALLY, THIS 27TH DAY OF JUNE 2022.**

**OCHARO KEBIRA**

**JUDGE**

In Presence of

Mr. Mwamburi for the Respondent.

Mr. Muthee holding brief for Mr. Pande for the Claimant.

**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 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**

