



**Nyabali v Mayfair Holdings Limited (Cause 103 of 2016)
[2022] KEELRC 1111 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1111 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 103 OF 2016
CN BAARI, J
JUNE 23, 2022**

BETWEEN

RAMA ENYONGA NYABALI CLAIMANT

AND

MAYFAIR HOLDINGS LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed this suit through a Memorandum of Claim dated April 20, 2016, and filed in court on April 22, 2016. He seeks a declaration that his termination is unfair and unlawful and contrary to the provisions of *the Constitution* of Kenya, the *Employment Act* and the *Fair Administrative Action Act*. The Claimant further prays for payment of one-month salary in lieu of notice, salary for five (5) days worked in February 2014 (5/28 x128720), one year leave arrears, pro-rata leave for 9 months, and 12 months' salary for wrongful termination.
2. The Respondent filed a Response to the Memorandum of Claim dated 24th May, 2016, and filed before court on May 31, 2016. The Claimant filed a reply to the Statement of defence on June 22, 2016.
3. The matter was first heard November 17, 2021. The Claimant testified in support of his claim and the Respondent presented two witnesses, a Mr. Francis Banda and a Mr. Hassan Shaban to testify in support of the Respondent's case.
4. Both parties filed submissions in the matter.

The Claimant's Case

5. The Claimant's case is that he was appointed to the position of Sales and Marketing Manager on or about April 16, 2012, on a monthly salary that subsequently rose to Kshs. 128,720/= per month.



6. The Claimant states that he offered the respondent diligent and faithful service until February 5, 2014, or thereabout, when the Respondent unlawfully and unfairly terminated his services without a proper legal notice and or assigning any reason (s) for the termination.
7. It is the Claimant's case that his termination was contrary to the principles of natural justice, Articles 28 and 47 of *the Constitution* of Kenya, Section 41 of the Employment, 2007, and the *Fair Administrative action Act*, 2015.
8. The Claimant avers that given his position in the service of the Respondent, and the manner in which his termination was handled, he was denied his legitimate expectation resulting in mental stress, anguish and professional embarrassment.
9. The Claimant avers that the Respondent has refused and/or neglected to have the matter resolved, and that the Claimant through his advocates on record wrote to the Respondent demanding the Claimant's due benefits or payment of his terminal dues and compensation for wrongful termination from employment. It is the Claimant's further assertion that the Respondent through her Counsel replied to his letter, and insisted that the Claimant was only entitled to Kshs. 147,558.92 for which he sent a cheque without indicating how the amount was computed and remained silent on the issue of wrongful/unfair termination.
10. The Claimant further states that he was advised by his advocates to receive the cheque from the Respondent on a without prejudice basis as part payment of his claim, and that the Respondent was informed through her Advocates of that position, and a further demand for the balance was made.
11. The Claimant prays that the court awards him the reliefs as listed in his statement of claim.

The Respondent's Case

12. The Respondent's case is that she employed the Claimant on April 16, 2012, in the position of Sales and Marketing Manager, and that as correctly indicated by the Claimant, his salary rose to Kshs.128,720/= per month.
13. The Respondent admits terminating the Claimant's employment and further avers that the termination was lawful, just and within the law, as termination was necessitated by the Claimant's misconduct and/or breach of the fundamental terms of his contract of employment. The Respondent denies that the termination was illegal.
14. It is the Respondent's assertion that the Claimant acted in disregard of his contractual engagement with the Respondent by soliciting money from sales men from the sales proceeds. The Respondent further avers that having noted with concern the actions of the Claimant, she issued him a warning letter dated December 9, 2013.
15. The Respondent further avers that the Claimant continued with his improper conduct despite the warning, leading to his termination vide a letter dated February 5, 2014.
16. It is the Respondent's further case that the Claimant failed to meet expectations and targets of the respondent's Management, which failure caused the Respondent financial losses and that the losses came to light after an audit exercise conducted by the Respondent.
17. The Respondent denies the particularized computations by the Claimant in paragraph 8 of the statement of claim and avers that upon termination, the Claimant was paid his dues in full as pleaded and he is thus not suited against the Respondent.



18. The Respondent further avers that the payment of Kshs.147,559.90 to the Claimant was fair compensation, and that the amount was made upon demand by the Claimant on the undertaking that the amount be full and final compensation.
19. On cross examination, RW1 confirmed to the court that the Claimant's salary was Kshs.128,720/- and not Kshs.117,720/- indicated in the letter on payment of terminal dues.

The Claimant's Submissions

20. It is submitted that the Claimant was not taken through a hearing as envisaged under Section 41 of the *Employment Act*, 2007, which provision is a mandatory requirement for every case of termination/dismissal. The Claimant sought reliance in the case of *Angela Wokabi Muoki v Tribe Hotel Ltd* [2016] eKLR, for the holding that the process of hearing and ensuring that an employee is given a fair chance to know the allegations against him, is a mandatory requirement of the law.
21. The Claimant further submits that the Respondent has failed to discharge the duty imposed upon her by Sections 43, and 45 of the *Employment Act*, for having failed to mention names of the specific employees that the Claimant solicited money from, this being the sole reason given for the Claimant's termination. The claimant relied on the holding in the case of *Grace Muthoni Muhoro v Gitbunguri Dairy & Community Sacco Limited* Cause No. 933 of 2015 [2020] eKLR.

The Respondent's Submissions

22. The Respondent submitted that the Claimant was warned both in writing and verbally prior to his termination and he never heeded the warnings. It is further submitted that the Claimant acted contrary to his employment agreement in soliciting money from the Respondent's sales men.
23. It is submitted for the Respondent that the Claimant's termination was fair and within the law for reason that the termination arose from the Claimant's misconduct. The Respondent further submits that the Claimant's termination was within the requirements of Section 45 of the *Employment Act, 2007*. She sought to rely on Justice Abuodha's holding in *Muchiri v Rev. Bishop Henry Kath and another* [2014] eKLR where the Learned Judge relied on the dictum of Lord Denning in *British Leyland v Swift* [1981] IRLR 91.
24. The Respondent submitted that the claimant is not entitled to the reliefs sought in his statement of claim.

Analysis and Determination

25. I have considered the pleadings herein, the witnesses' oral testimonies and the rival submissions. The issues for determination are:
 - i. Whether the Claimant was unfairly terminated.
 - ii. Whether the Claimant is deserving of the remedies sought.



Whether the Claimant was unfairly terminated.

26. The Claimant was terminated from the service of the Respondent vide a letter dated February 5, 2014. The termination letter states:

“As discussed with you, we hereby terminate your employment with Mayfair Holdings Limited by giving you one month notice effective the date of this letter. You will be required to take all your pending leave days during the notice period.”

27. The *Employment Act*, 2007, provides that an employer shall not terminate the services of an employee unfairly. By this provision, the Act obligates an employer to initiate various fair procedure mechanisms of discipline in the work place, and ensure fairness in every step of a discipline process. Failure to meet the stringent requirements of the law in respect of a termination/dismissal, amounts to unfair termination/dismissal.

28. Fair hearing and provision of valid and fair reasons, also known as substantive justification for termination, are the two limbs upon which a court determines fairness of a termination.

29. Fair hearing is both a constitutional and statutory requirement demanded of an employer in a termination/dismissal process. It is anchored on Section 41 of the *Employment Act*, which provides as follows: -

“41(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

30. The termination letter captioned herein does not refer to a disciplinary process of whatever nature prior to the Claimant’s termination, and neither did the Respondent’s witnesses make mention of any kind of a disciplinary process. The *Employment Act* has made it mandatory by virtue of Section 41 for an employer to notify and hear any representations an employee may wish to make whenever termination is contemplated. (See *Mary Mutanu Mwendwa v Ayuda* [2013] eKLR).

31. The Claimant was simply issued with a warning letter which was followed a few months’ later by the letter of termination. The termination letter gives the Claimant a one month’s notice of termination. It is no longer enough to give an employee termination notice or payment in lieu therefore, the right to be heard is absolute. In the case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2014] eKLR the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.

32. The Supreme Court of Kenya re-affirmed this position in the case of *Kenfreight (EA) Limited v Benson K. Nguti* [2019] eKLR, where it held that it is not enough to terminate employment by notice or payment in lieu thereof; termination should be based on valid reasons and fair procedure.

33. The Respondent evidently failed the procedural fairness test as the Claimant was not accorded an opportunity to respond to the issues raised or be heard in relation thereto, contrary to the express requirements of the Section 41 of the *Employment Act* and Section 4 of the Fair Administrative Actions Act.



34. In the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, the Court of Appeal stated:

“Section 41 of the *Employment Act*, provides the minimum standards of a fair procedure that an employer ought to comply with. The Section provides for notification and hearing before termination on grounds of misconduct.

The court stated that four elements must be discernible for the procedure to pass:

- a. an explanation of the grounds of termination in a language understood by the employee;
- b. the reason for which the employer is considering termination;
- c. entitlement of an employee to the presence of another employer of his choice when the explanation of grounds of termination is made
- d. hearing and considering any representation by the employee and the person chosen by the employee.”

35. The Respondent failed to meet the irreducible statutory minimums principles of fair hearing, set out by the Court of Appeal in the foregoing case.

36. I find and hold that the Claimant’s termination is procedurally unfair.

37. The second limb in addressing the issue of fair termination, is the question of substantive justification. This concerns reasons for which the Claimant was terminated, and specifically whether the reasons were valid, reasonable and justified.

38. The Respondent told this court that it terminated the Claimant for gross misconduct, with the salient feature of the misconduct being soliciting money from sales men; money that belongs to the Respondent as proceeds of sales, and which action caused the Respondent financial loses.

39. Sections 43, 45 and 47(5) of the *Employment Act*, require that an employer must prove the reasons for termination/dismissal, prove that the reasons are valid and fair and prove that the grounds are justified. Reasons for termination have generally been agreed to be matters that the employer at the time of termination of contract, genuinely believed to exist, and which caused the employer to terminate the employee. Courts have held that the decision to dismiss ought to be hinged on an objective test, such as whether a reasonable employer in similar circumstances, would have dismissed the employee. (See *Mwanajuma Juma Kunde v KAPS Municipal Parking Services Limited* Cause No. 57 of 2012.) [2013] eKLR.

40. The Claimant was issued a warning letter dated December 9, 2013. The warning letter concerned inflation of bonuses and the resultant financial loses to the Respondent. The letter of termination did not provide reasons as to why the decision to terminate the Claimant’s contract was arrived at and, yet again the Respondent’s witnesses at the hearing told the court the reason the Claimant was terminated for soliciting money from the Respondent’s sales men and failure to meet targets.

41. In my view, reasons for termination ought to be clear and specific, hence the varied reasons for termination given at different stages, lead me to the conclusion that the Claimant’s termination does not meet the test of legality and reasonableness, and therefore the termination is substantively unfair. (See *British Leyland UK Ltd v Swift* [1981] IRLR 91.

42. For the reasons foregone, I find the Claimant’s termination both procedurally and substantively unfair.



Whether the Claimant is entitled to the Remedies sought.

43. The Claimant through his claim, seeks a declaration that his termination is unfair and unlawful, payment of one-month salary in lieu of notice, salary for five (5) days worked, one year leave arrears, pro-rata leave for 9 months, and 12 months' salary for wrongful termination.

Compensation for unfair termination

44. The finding of unfair termination entitles the claimant to compensation per Sections 49 and 50 of the *Employment Act*, 2007. In determining an award of compensation, the court is to consider the 13 factors set out under section 49 (4) of the *Employment Act*.
45. The Supreme Court in *Kenfreight (E.A) Limited v Benson K. Nguti* [2019] eKLR noted as follows:
- “When giving an award under Section 49 of the *Employment Act*, a court of law is expected to exercise judicial discretion on what is fair in the circumstances.”
46. The Claimant was in the employ of the Respondent for close to two years. The circumstances in which the termination took place, point to the possibility that the Claimant could have contributed to his own termination. The Claimant during the hearing, told the court that he is currently employed.
47. In the circumstances, and considering the guiding principles for remedies under Section 49, is that they are awarded to compensate the Claimant, not to punish the employer, it is my view that the Claimant has not proved a case for maximum compensation, and is hereby awarded six (6) months' salary as compensation for the unfair termination.
- Payment of one-month salary in lieu of notice, salary for five (5) days worked, one year leave arrears, pro-rata leave for 9 months
48. The claims under these headings were all paid vide a cheque made to the Claimant, and which the Claimant acknowledged receipt of. The payments were however underpaid in view of the Claimant's monthly salary at the time of termination, which was agreed by both parties to have been Kshs.128,720/- and not Kshs.117,720/- that was used for the computation.
49. The claim for payment of one-year leave was covered by the leave taken during the notice period.
50. The Claimant is hereby awarded the difference in what was paid, and what ought to have been paid in all the other claims under this heading.
51. In whole, Judgment is entered for the Claimant as against the Respondent as follows:
- a. A declaration that the Claimant's termination is unfair.
 - b. Payment of Six (6) Months' salary in compensation for unfair termination at Kshs.772,320/-
 - c. One-month salary in lieu of notice Kshs.11,000/-
 - d. Pay for Five days worked Kshs.1,964.31/-
 - e. Prorata leave Kshs.5,928/-
 - f. Total awarded Kshs.791,212.31/-
52. Judgment accordingly.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS
23RD DAY OF JUNE, 2022.**

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Ongeru present for the Claimant

N/A for the Respondent

Christine Omollo- C/A

