



**Transport Workers Union v Great Rift Express Shuttles Ltd (Cause 2520 of 2017) [2022] KEELRC 1130 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1130 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE 2520 OF 2017**  
**SC RUTTO, J**  
**JUNE 23, 2022**

**BETWEEN**

**TRANSPORT WORKERS UNION ..... CLAIMANT**

**AND**

**GREAT RIFT EXPRESS SHUTTLES LTD ..... RESPONDENT**

**JUDGMENT**

1. The claimant has brought the instant suit on behalf of the grievant, Mr. Simon Mburu, who it avers, is its member. The claimant avers that the grievant was employed by the respondent as a branch manager in its Nairobi offices with effect from 3<sup>rd</sup> March, 2016. That he worked satisfactorily until 6<sup>th</sup> November, 2016 when his employment was unfairly terminated. Subsequently, the claimant seeks against the respondent, on behalf of the grievant, the sum of Kshs 276,995.00 being notice pay, unpaid salary for seven (7) months, payment of prorated leave, compensation for overtime and compensatory damages.
2. The claim was challenged through the respondent's statement of response dated 21<sup>st</sup> February, 2018. The respondent denied entering into a contract of employment with the grievant and averred that he was only engaged on a casual basis until his services were terminated. The respondent further averred that the grievant was always drunk, absconded work and was always late in reporting for duty hence leaving it with no option but to terminate his services. The respondent asked the Court to strike out the claim.
3. The matter was determined by way of documentary evidence pursuant to Rule 21 of this Court's Rules (2016).



### **Claimant's case**

4. It is the claimant's case that the grievant was employed as a branch manager by the respondent and was earning a consolidated salary of Kshs 25,000/=. That he was terminated after he fell sick and upon notifying the respondent's director. That as such, he sought medical attention at Afraha Nursing home and was granted three (3) days sick off.
5. That upon resuming duty, the grievant was denied access to the respondent's premises. That the grievant later learnt from his work mates, that the respondent's director had instructed them through text messages, not to allow him back to work. The claimant avers that the grievant's termination was unfair and contrary to sections 41,43 and 45 of the *Employment Act*.
6. The claimant further states that the dispute was initially reported to the Ministry of Labour for conciliation, but the negotiations fell through after the respondent through its Advocates, negated an earlier agreement reached on 17<sup>th</sup> March, 2017. That as a result, the conciliator issued a certificate of unresolved dispute.

### **Respondent's case**

7. It is the respondent's case that the grievant was engaged as a casual employee. That further, he was always drunk, absconded duty and was always late in reporting for duty hence leaving the respondent with no option but to terminate his services. The respondent termed the medical documents presented by the grievant, as forgery. It further denied participating in any conciliatory process with the claimant. The respondent termed the entire claim as malicious and further averred that the same contains numerous misstatements and deliberate omissions of material facts.

### **Submissions**

8. It was submitted on behalf of the grievant that he was unfairly terminated contrary to sections 41, 43 and 45 of the *Employment Act* and that the respondent refused to pay his terminal benefits.
9. On its part, the respondent submitted that the grievant was not employed on a permanent basis. That the grievant was a tout and a stage attendant earning a salary of Kshs 800/= daily. That his engagement was pegged on his availability as he was always drunk. That having been engaged on a casual basis, the provisions of section 41,43 and 45 of the *Employment Act* do not apply.

### **Analysis and determination**

10. Having considered the pleadings on record, the evidentiary material before me and the opposing submissions, the questions calling for resolution by the Court can be distilled as follows: -
  - i. What were the terms of engagement of the grievant?
  - ii. Was the grievant's termination fair and lawful?
  - iii. Is the grievant entitled to the reliefs sought?

### **What were the terms of engagement of the grievant?**

11. It is the respondent's case that the grievant was engaged as a tout and stage attendant, on a casual basis. It is on this basis that the respondent avers that the provisions of sections 41, 43 and 45 of the *Employment Act*, are not applicable.



12. Despite its assertions, the respondent did not produce any evidence to back up its assertions that the grievant was a casual employee. The respondent was under a duty under section 10(7) of the *Employment Act* to prove the grievant's terms of engagement.
13. On this issue I will draw guidance from the determination by the Court of Appeal in the case of *Jackson Muiruri Wathigo t/a Murtown Supermarket vs Lilian Mutune* [2021] eKLR, where it was held that: -
  - “[21]. Their position was that the respondent was a casual employee while the respondent argued that she was not. In this regard, the learned Judge correctly appreciated that by virtue of Section 10(7) of the *Employment Act* the appellant was under a duty as the employer to produce written particulars of the respondent's employment. His failure to do so placed the burden of proof upon him to establish his contention as well as disprove the respondent's allegation. See *Nanyuki Water & Sewage Company Limited vs. Benson Mwiti Ntiritu & 4 others* [2018] eKLR. In our view, the appellant did not discharge the above burden. It was not enough for him to just state that the respondent was a casual employee. More was needed to support his position.”
14. I will similarly find and hold that the respondent had the burden of establishing the nature of the grievant's employment and indeed, prove that he was engaged on a casual basis.
15. Besides, the respondent did not dispute the evidence produced by the claimant in the form of the grievant's employment card which designates him as “Manager”. It failed to rebut with evidence, that indeed, the grievant was engaged as a tout and stage attendant.
16. This leads me to conclude that the grievant was not engaged as a casual employee hence he was entitled to the safeguards under sections 41, 43 and 45 of the *Employment Act*.

#### **Whether the grievant's termination was lawful and fair?**

17. Section 43(1) of the *Employment Act* places the burden of proving reasons for a termination upon the employer, and in absence thereof, such termination is deemed to be unfair. In line with this, section 45 (2) (a) and (b) of the *Employment Act* qualifies a termination as unfair if the employer fails to prove that the reason for an employee's termination is valid, fair and is related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.
18. Flowing from the above statutory provisions, the respondent was required to prove the reasons for the grievants' termination from employment.
19. The respondent has averred that the reasons for the termination of the grievant's employment was that, he absconded duty, was always drunk and was always late in reporting for duty.
20. Be that as it may, the respondent failed to prove the allegations of drunkenness, lateness and abscondment of duty, against the grievant. The same were not substantiated by way of evidence, presented in any form or manner.
21. Further, it bears to note that the claimant produced a medical report from Afraha Maternity Nursing Home dated 6<sup>th</sup> November, 2016 together with a medical certificate, granting the grievant three (3) days sick off. First, the respondent did not deny being notified of the grievant's illness and second, despite terming the medical documents, an act of forgery, it did not present evidence to discount the same. Consequently, it failed to back up this assertion.



22. In light of the foregoing, the reasons for the grievant's termination were not proved as per the requisite standard and fell below the legal threshold under sections 43 and 45(2) (b) of the [Employment Act](#).
23. Over and above proving the reasons for termination, the respondent was under a statutory obligation under sections 45(2) (c) and 41 of the [Employment Act](#), to subject the grievant to a fair process prior to termination.
24. Section 45(2) (c) of the [Employment Act](#) provides that for termination of employment to be fair, it ought to be in line with fair procedure. The specific requirements of fair procedure are stipulated under Section 41(1) of the [Employment Act](#). This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations.
25. The claimant contends that the requirements of fair hearing were not complied with, prior to the grievant's termination. The respondent in its response, neither demonstrated nor indicated that it complied with the requirements of fair procedure as stipulated under section 41 of the [Employment Act](#).
26. Notably, the requirements of aforesaid section 41, are mandatory in nature. My position is fortified by the finding by the Court of Appeal in the case of [Postal Corporation of Kenya v Andrew K. Tanui](#) [2019] eKLR where the learned Judges reckoned 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 representations made by the employee and the person chosen by the employee.”
27. Having failed to demonstrate compliance with the requirements of section 41 of the [Employment Act](#), I am led to conclude that the respondent did not accord the grievant procedural fairness.
28. The upshot of the foregoing, is that there were no valid and fair reasons to warrant the grievant's termination, and further, he was not subjected to a fair process prior to being terminated from employment.
29. To this end, I find and hold that the grievant's termination was unfair and unlawful, having fallen short of the requirements stipulated under sections 43, 45 and 41 of the [Employment Act](#).
30. Having found as such, what reliefs then avail the grievant?

### **Reliefs**

31. Having found that the grievant's termination was unfair and unlawful, he is awarded one month's salary in lieu of notice.



32. The grievant is further awarded four (4) months gross salary in compensatory damages as the court has found that he was unfairly terminated. This award takes into consideration the length of the employment relationship, between the parties.
33. The claim for salary underpayment is denied as there was no evidence that the grievant was underpaid as alleged.
34. The claim for overtime collapses as the claimant has failed to particularize the specific periods the grievant worked overtime hence justification for the award.
35. The grievant is also entitled to a certificate of service pursuant section 51(2) of the [Employment Act](#).

### **Orders**

36. In the final analysis, I enter judgment in favour of the claimant against the respondent and the grievant is awarded: -
  - (a) Compensatory damages equivalent to four (4) months' gross salary being Kshs 100,000.00.
  - (b) One (1) month's salary in lieu of notice, being the sum of Kshs 25,000.00.
  - (c) The total award is Kshs 125,000.00.
  - (d) Interest on the amount in (c) at Court rates from the date of Judgment until payment in full.
  - (e) The respondent shall also bear the costs of this claim.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE, 2022.**

**STELLA RUTTO**

**JUDGE**

#### **Appearance:**

For Claimant Mr. Ndege

For the Respondent Omondi Ogutu Associates

Court assistant Barille Sora

### **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 had 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.

**STELLA RUTTO**

**JUDGE**

