



**Mwema v Brand Kenya Board (Cause 1441 of 2014)
[2022] KEELRC 1469 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1469 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1441 OF 2014
MA ONYANGO, J
JUNE 16, 2022**

BETWEEN

BETH KALONDU MWEMA CLAIMANT

AND

BRAND KENYA BOARD RESPONDENT

JUDGMENT

1. By way of a memorandum of claim dated August 26, 2014as amended on October 12, 2016, the Claimant seeks the following reliefs: -
 - a. A Declarationthat the Claimant’s right to equality and freedom from discrimination, to fair labour practices and human dignity have been and continue to be violated by the Respondent.
 - b. An Ordercompelling the Respondent to effect genuine and long-term redeployment of the Claimant to as per the doctor’s advice.
 - c. An Order for compensation of general damages for gross violations of the Claimant’s Constitutional rights under the Bill of rights amounting to Kshs.3,000.000/-
 - d. An Orderfor compensation of the Claimant’s overtime allowance amounting to Kshs.242,248/-.
 - e. An Orderfor compensation under the Work Injury Benefits Act, 2007 of Kshs.4,213,248/-
 - f. Costs of the Claim
 - g. Interest on c), d) and e) above and j) and K) below from the date of filing the Claim
 - h. Any other or further relief that the Court may deem fit to grant.



- i. A declaration that the Respondent wrongfully and unlawfully terminated the services of the Claimant.
 - j. Compensation/damages equal to 12 months' salary for wrongful and or unlawful termination.
 - k. Additional general damages for loss of amenities, aggravated and exemplary damages.
2. In her Amended Memorandum of Claim, the Claimant avers that she was employed by the Respondent, a state parastatal on October 16, 2009 in the position of receptionist earning a basic salary of Kshs.30,388/-.
 3. The Claimant further avers that she performed her duties diligently and to the Respondent's satisfaction until August 3, 2016 when the Respondent wrongfully and unlawfully terminated her employment.
 4. She further avers that during the course of her employment she begun feeling some sharp and irritating pain in her ears daily and frequent bouts of acute headaches forcing her to be examined.
 5. That upon medical examination the doctors recommended her redeployment to a different location and not the Respondent's switch board.
 6. The Claimant contends that the Respondent did not take action despite verbal requests for redeployment thus causing her a lot of pain and suffering. She avers that the Respondent's treatment towards her was unlawful, unfair and discriminatory.
 7. She contends that the continued failure by the Respondent to act caused her to suffer from hypertension, a condition that the doctors attributed to work related stress. Subsequently, she had surgery on her ear but the Respondent still failed to redeploy her exposing her to a lot of noise from the switchboard against the doctors' recommendation.
 8. The Claimant avers that the Respondent's actions and/or inactions have occasioned her a lot of pain, suffering and loss of opportunities as particularized in paragraph 12 (i) to (xii) of her Amended Memorandum of Claim.
 9. The Claimant contends that on November 27, 2013 the Respondent did finally purport to redeploy her and reassigned her to its main reception desk and relieved her of her duties at the switch board. She testified that despite the alleged redeployment she continued serving at the Respondent's switch board on a need to need basis and as directed by her supervisors.
 10. The Claimant further contends that the Respondent failed to pay her overtime for the period February 2010 to June 2012 being a total of 566 hours even though it paid overtime to other members of its staff.
 11. She further contends that the Respondent in gross violation to her rights to human dignity and right to equal remuneration for work of equal value paid her a salary of Kshs.30,388/- despite the fact that her colleagues in the same grade and with equal qualifications received a salary of over Kshs.40,000/-.
 12. She further testified that she was the only member of staff of the Respondent who did not receive any special responsibility allowance whenever she was called upon to work in place of a colleague contrary to the provisions of the Respondent's Human Resources Manual that provided for the payment of special allowances in such circumstances.
 13. The Claimant accuses the Respondent of discrimination contrary to the provisions of Section 5 of the Employment Act, 2007 as read with the Constitution of Kenya, 2010.



14. She averred that she is entitled to seek compensation from this Court for the pain and suffering that was occasioned to her by the Respondent's ill treatment by dint of the provisions of Part V Section 30 of the Work Injuries Benefits Act, 2007 and therefore urged this Court to make a finding in her favour on this regard.
15. In conclusion the Claimant urged this Court to find her Amended Memorandum of Claim with merit and allow it in terms of the reliefs sought.

Respondent's case

16. In its Amended Reply to the Memorandum of Claim filed in Court on November 22, 2017, the Respondent admits that it employed the Claimant with effect from October 22, 2009. It contends that the subsequent termination of her employment was lawful and justified.
17. The Respondent denied exposing the Claimant to stress, physical strain or emotional trauma as alleged. It testified that the Claimant's condition is as a result of pre-existing conditions and it is not responsible for the same.
18. It further contends that the duties assigned to the Claimant at its reception desk are in fact light duties and that such duties would not have occasioned the Claimant any of the alleged ailments complained of. The Respondent further testified that it renovated its reception area in June 2011 by fitting a wall that would shield and/or separate it from the switch board.
19. It further contended that it did redeploy the Claimant to a new office as per her request where her performance was dismissal.
20. The Respondent testified that the Claimant falsely attributed her medical conditions to the Respondent.
21. The Respondent denied the Claimant's averments on the ear surgery maintaining that the Claimant frequently talked of a nose surgery to control asthmatic attacks.
22. The Respondent further testified that the Claimant is guilty of withholding crucial information from this Court which information the Respondent maintains had greatly fuelled the Claimant's medical condition. The Respondent avers that the Claimant suffers physical attacks from an abusive marriage that have occasioned her on several occasions to exceed the medical limit for staff.
23. The Respondent denied any allegations of discrimination as advanced by the Claimant in her amended memorandum of claim maintaining that the Claimant's health issues cannot be attributed to her duties as alleged but her domestic abusive relationship.
24. The Respondent further testified that the Claimant received fair remuneration for work done and that her salary was reviewed from time to time. It further stated that the Claimant's allegation of unfair pay was not backed by any evidence. The Respondent contended that the Claimant's performance was dismissal as confirmed by the appraisals and it would therefore be unfair to compare her with other members of its workforce.
25. The Respondent denied any claim for overtime pay as alleged by the Claimant. The Respondent further denied the allegation that the Claimant was entitled any other allowances and/or special responsibility allowance as alleged.
26. The Respondent testified that the Claimant's termination was lawful, valid and that due process was followed as detailed in paragraph 33(i) to (iv) of the Amended Reply to the Amended Memorandum of Claim.



27. The Respondent testified that the claimant is not entitled to any of the reliefs sought in her Amended Memorandum of Claim and therefore urged this Court to dismiss the same with costs to the Respondent.

Evidence

28. This case was heard on April 17, 2018 and January 27, 2022. The Claimant testified on her own behalf and the Respondent called one witness, Damaris Ngugi, its Human Resource Manager who testified on its behalf. Thereafter parties filed and exchanged written submissions.

Claimant's Case

29. The Claimant adopted her witness statement dated April 11, 2018 as her evidence in chief. She further produced as exhibits the List and Bundle of documents dated August 27, 2018 as well as the Supplementary List of documents filed in Court on April 12, 2018.
30. She testified that prior to her termination on August 2, 2016 she faced a lot of challenges due to some mishandling by the Respondent.
31. She testified that her understanding of her assignment with the Respondent was that she was assigned to the reception and expected the Respondent to get another member of staff to handle telephone operations.
32. She testified that she developed very serious medical problems as a result of her strenuous duties and had an ENT operation as a result of her work-related stress and challenges.
33. The Claimant further stated that as per the medical report by Dr. Macharia, her medical challenges were caused by excessive use of the telephone. She testified that the said doctor made a personal call to the Respondent's CEO but there was no change in assignment of duties.
34. The Claimant testified that in the year 2012 she was admitted and was diagnosed with High Blood Pressure. She was attended to by Dr. Wafula, who recommended that she be re-deployed to a less noisy environment. She testified that both medical reports were availed to the Respondent and at some point. She was assigned another person to man the telephone as evidenced by the re-deployment letter dated November 27, 2013. She however testified that her move was not immediate but was precipitated by the fact that her condition had worsened.
35. The Claimant testified that she was terminated unfairly as she was not accorded a fair hearing. She testified that while she was on sick off for a period of six (6) weeks following a surgery on her knee she was called to appear before the Respondent's ad hoc committee for a disciplinary hearing on 18th February, 2016. She testified that she had two sessions with the committee.
36. The Claimant testified that she protested the treatment and informed the committee that the process was unfair due to the fact that she was unwell.
37. The Claimant further testified that the Respondent's allegation that she frequently absented herself from duty was not true.
38. On cross examination, the Claimant stated that her husband was employed as a chief and was earning a monthly salary of Kshs.100,000/-. She denied any allegations of maltreatment from her husband insisting life at home was easy.
39. She further stated that when she applied for the vacancy at the Respondent's establishment she applied for the position of receptionist/telephonist and that she had previously worked at the Hilton Hotel



as a cashier/receptionist and telephone operator and at Co-operative bank as a telephone operator as detailed in her curriculum vitae.

40. The Claimant confirmed making telephone calls to her husband's number during working hours and using the Respondent's resources. She further admitted that it would be ironical for her to claim her medical condition was due to her work yet she made several long calls to her husband.
41. The Claimant testified that her claim for overtime payment was for work done during lunch hour when she was instructed by the Respondent's representative. She however admitted that there was no any evidence to support her claim. She admitted that she received the office memo dated 23rd January stipulating office working hours being from 8 am to 1pm and from 2pm to 5pm Monday to Friday, which excludes lunch breaks.
42. The Claimant attributed her medical condition to work environment as she did not have any medical issues prior to joining the Respondent organization. She testified that her medical condition was caused by the stress and hostile working environment caused by the Respondent.
43. She further testified that the reason cited for her termination was absenteeism from work for 6 days and neglecting work from November 30, 2015 to February 2016.
44. On re-examination CW1 testified that her health condition started after she was employed by the Respondent and that prior to her employment she had a medical report that gave her a clean bill of health. That she did not have any condition prior to her appointment.

Respondent's Evidence

45. RW1, Damaris Ngugi, the Respondent's Human Resource Manager adopted her witness statement dated May 29, 2019 as her evidence in chief and further relied on the list and bundle of documents dated October 9, 2014 as well as the supplementary bundle of documents dated April 11, 2018.
46. On cross examination, RW1 confirmed that the Claimant had previously requested for a reliever to take over her duties during lunch break. She testified that she was not aware if such a reliever was appointed by the Respondent.
47. RW1 further testified that the Claimant was given sufficient time to prepare for the disciplinary hearing and that she was duly informed of her right to representation at the hearing.
48. On re-examination RW1 stated that the medical report prepared on behalf of the Claimant was by a doctor not in the panel of doctors and that the Respondent can only verify such reports if they are prepared by an authorized doctor.
49. RW1 stated that the Claimant even though informed of her rights failed to call any witness at the disciplinary hearing insisting that the time was limited for her to call any witness. RW1 further testified that the Claimant's employment was terminated after she was accorded a fair hearing and after approval by the Respondent's full board.

Submissions by the Parties

50. In her submissions the Claimant testified that her termination was unlawful and unfair as the Respondent failed to comply with the mandatory provisions of Section 41 of the *Employment Act, 2007* as read with Articles 41 and 50(b) of *the Constitution* and Section 4 of the *Fair Administrative Action Act* that advocate for a fair hearing prior to actions been taken. To buttress this argument the Claimant relied on the Court findings in the Court of appeal decision in the case of *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR and the cases of *Mary Chemweno Kiptui v Kenya*



Pipeline Company Limited [2014] eKLR and *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR.

51. The Claimant further submitted that her termination was in fact unlawful and unfair having denied the allegations of absenteeism from work as presented by the Respondent. She testified that she had demonstrated by way of evidence that her absence from work was due to illness as supported by the sick off sheets and medical reports attached in her Claim.
52. She submitted that the termination of her employment was unfair, within the meaning of Section 45 of the *Employment Act*, 2007. She relied on the decision in *Kennedy Nyanguncha Omanga v Bob Morgan Services Limited* [2013] eKLR for emphasis.

Respondent's Submissions

53. The Respondent submitted that it indeed had a valid reason to terminate the Claimant's employment and that due process was followed in that the Claimant was accorded a fair hearing prior to the decision to terminate her employment as required under Section 41 of the *Employment Act*, 2007. To fortify this argument the Respondent relied on the decision in *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR where the Court held that an employee must be informed of the charges levelled against them and be accorded a fair hearing prior to the termination.
54. The Respondent further testified that prior to her termination the Claimant had a chequered record of absenteeism and therefore it had proved a valid or fair reason for her termination. To buttress this argument the Respondent relied on the case of *Sarah Wanyaga Muchiri v Henry Kathii & another* [2014] eKLR where the Court referred to the English decision in the case of *British Leyland UK Ltd v. Swift* [1981] IRLR 91 on what constitutes a fair and valid reason for termination.
55. The Respondent submitted that the Claimant was duly served with a notice stating all the allegations levelled against her and was given sufficient time to interrogate the same before being invited for a disciplinary hearing by the Respondent's ad hoc disciplinary committee following which the decision to terminate her employment was arrived at.
56. On the Claim for special damages, the Respondent submitted that the same had not been specifically pleaded and proved by the Claimant and cannot be awarded. For emphasis the Respondent cited the case of *Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank* [2004] eKLR and *Banque Indosuez v D.J. Lowe & Company Limited* [2006] eKLR where the Courts held that specific damages must not only be specifically pleaded, they must be strictly proved to be awarded.
57. The Respondent further submitted that the Claim for overtime payment should be dismissed by this Court for want of proof.
58. On the Claim for general damages for gross violations of her constitutional rights on account of the alleged unfair termination, the Respondent submitted there were no such violations as contended by the Claimant as the termination was procedural, fair and was done in compliance with the provisions of Sections 41 and 45 of the *Employment Act*, 2007.
59. The Respondent urged this Court to find the claim devoid of merit and to dismiss it in its entirety with costs to the Respondent.



Analysis and Determination

60. I have carefully considered the pleadings, evidence and the rival submissions presented by both sides. It is not in dispute that the Claimant was employed by the Respondent from October 22, 2009 until August 3, 2016 when her employment was terminated on grounds of absconding lawful duties.
61. The issues for determination are
- a. Whether the Claimant was unfairly and unlawfully terminated;
 - b. Whether the Claimant is entitled to the reliefs sought.

Was the Claimants' employment unfairly terminated?

62. Section 45(1) and (2) of the [Employment Act](#) makes the following provisions regarding unfair termination of employment—
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.
63. Flowing from the above mandatory provision of the law termination of an employee's contract of service does not pass the test of fairness unless the employer establishes by evidence that it was done on the basis of valid and fair reasons(s) and upon following a fair procedure.

Reason for the termination.

64. The reason cited for terminating claimants' employment is gross misconduct for among other grounds absenting herself from lawful duties without permission for a period of six (6) days from 22nd to 28th September, 2015. The Claimant's letter for termination dated 2nd August, 2016 reads as follows: -

“BKB/CONF/ 2009021/1/216 August 2, 2016

Ms. Beth Kalondu Mwema

Box 76233 – 00100

Nairobi

Dear Ms. Kalondu

RE: Termination of Service

Reference is made to our letter Ref No BKB/CONF/2009021/ 1 (215) dated 31st May, 2016 and your subsequent response to the show cause letter dated 6th June 2016.

The Board HR Committee in its meeting held on 26th April, 2016 discussed the recommendations of management based on the hoc Disciplinary Committee Report of



March 14, 2016 and your response dated June 6, 2016 to the show cause letter of May 31, 2016 and noted that you seriously breached your terms and conditions of service as per the findings of the Ad hoc Disciplinary Committee as follows:

- i. You absented yourself from work without proper permission for six (6) days from 22nd to 28th September 2015
- ii. You wilfully neglected and/or absconded to perform your work from November 30, 2015 to February 9, 2016 which was your duty to perform under your employment contract
- iii. You failed and/or refused to obey lawful instructions to work from the station allocated to you for the performance of your duties.
- iv. You failed and/or refused to submit the sick leave certificates within the stipulated time as per the Corporation sick leave policy and
- v. You attempted to influence your deployment by using a copy of a doctor's letter dated November 24, 2014 which was received by the Corporation on November 30, 2015

The Committee further noted that these breaches of your terms and conditions of service amounted to gross misconduct and constituted justifiable/lawful grounds for summary dismissal as stipulated under the Employment Act, 2007 section 44 (4) (a), (c) and (e) and the Board's HR Policy Manual 2010 section 17.10 (iv).

Consequently, this letter serves to inform you that your services with Brand Kenya Board have been terminated with effect from August 3, 2016 on account of gross misconduct as stated above. In consideration of the years you have served the Board and with leniency, you will be paid one (1) month's salary in lieu of notice as per your terms and conditions of employment. Please handover to the Administrative Assistant.

Further, upon handover and completion of the clearance procedures, you will be paid your terminal dues in line with the provisions of the Board's HR Policy and the Employment Act, 2007.

I take this opportunity to thank you for your service to the Board and wish you the best in your future endeavours.

Yours truly

(signed)

Mary Luseka

Chief Executive Officer (Ag)"

65. I have carefully considered the material placed before the court by the parties including the Respondent's Human Resource Policy Manual and the sick sheets availed by Claimant.
66. Sick leave is provided for under Clause 8.1 as follows:

Clause 8.1 Categories of Leave

- b. Sick Leave



Sick leave is defined as an approved absence of an employee from duty on account of illness. Sick leave must be granted by a duly authorised officer and a d submitted to the Chief Executive Officer through the supervisor within 48 hours of absence or as soon as practicable in-case of admission.

67. The Respondent's case is that the Claimant failed to comply with the above provision in that she did not avail her sick sheets within the stipulated timelines. The Claimant did not dispute this assertion.
68. On the allegations by the Claimant that she contracted a medical condition at work as a result of constant use of the telephone, the Respondent availed evidence of call logs that show that the Claimant made very long calls to her husband, a fact that she admitted during cross examination.
69. There is further evidence that the Claimant was a habitual latecomer. There are numerous letters and internal memos addressed to the Claimant on the lateness.
70. On the issue of absenteeism, I find that the Claimant failed to comply with the Respondent's Human Resource Manual as she failed to remit sick sheets within the stipulated timelines. There is further no evidence that the Claimant was admitted between 22nd to 28th September 2015, a total of six (6) days, for which she was terminated.
71. Respondent I find that the Respondent has proved that it indeed had valid and fair reasons to terminate the employment of the Claimant.

The procedure followed

72. Section 41 of the *Employment Act* which provides:
 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.
 2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make."
[Emphasis Added]
73. The Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR held:

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”



74. In this case the Claimant contended that she was not accorded a fair hearing prior to the termination of her employment insisting that she was forced to attend the disciplinary hearing while she was away on sick leave after being operated on.
75. She however, did not deny appearing before the Respondent's Ad hoc Disciplinary hearing. No evidence was availed of any protest to proceed on the hearing date. There is also no evidence of a request to have the hearing adjourned to another date convenient to the Claimant.
76. The Respondent on its part testified that due process was followed and that the Claimant had been issued with all requisite notices and was invited for hearing prior to the decision to terminate her employment being arrived at.
77. The Respondent attached to its supplementary list of documents dated 11th April, 2018 the report of the Ad hoc Disciplinary Committee meeting which clearly confirms that the Claimant was accorded a fair hearing in line with the mandatory provisions of section 41 of the Employment Act, 2007. I therefore find that the Claimant was accorded a fair hearing under Section 41 of the Employment Act, 2007.

Whether the Claimant is entitled to the reliefs sought

78. Having found that the Claimant's termination was valid both procedurally and substantively, she is not entitled to the reliefs sought in her Amended Memorandum of Claim.
79. The upshot of this is that the claim fails in its entirety with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16TH DAY OF JUNE 2022

MAUREEN ONYANGO

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 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.

MAUREEN ONYANGO

JUDGE

