



**Lubengwa v Officer in Charge Ministry of Works, Welfare & Sports Association
(Cause 2265 of 2016) [2022] KEELRC 108 (KLR) (14 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 108 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2265 OF 2016
NZIOKI WA MAKAU, J
JUNE 14, 2022**

BETWEEN

REUBEN KWEYA LUBENGWA CLAIMANT

AND

**OFFICER IN CHARGE MINISTRY OF WORKS, WELFARE & SPORTS
ASSOCIATION RESPONDENT**

JUDGMENT

1. The Claimant instituted this claim vide a Memorandum of Claim dated November 8, 2016 against the Respondent for wrongful dismissal and claim for outstanding terminal dues. He avers that the Respondent employed him as a Security Guard on May 2, 2011 and he served it with loyalty and diligence until June 30, 2016 and that the terms of employment were based on an oral contract. It is the Claimant's averment that the Respondent unlawfully and unprocedurally terminated his employment without issuing him any written reason or warning letter. He seeks payment for the extra four (4) hours he worked on a daily basis, underpayment of basic pay, unpaid Public Holidays worked, unpaid house allowance, ungranted four days off-duties per month for the entire period worked of 60 months, and annual leave days. Further, that the Respondent deducted NSSF and NHIF money from while being aware that he was not a member of NSSF or NHIF and that the Respondent should therefore be ordered to refund the deducted sums. The Claimant further prays that this Honourable Court award him salary for July 2016, one month's notice, service pay, compensation for unfair dismissal, certificate of service, costs of the suit, and interest.
2. The Claimant states in his Witness Statement that the Respondent paid him a monthly salary of Kshs. 10,500/- only which was an underpayment. That he approached the Respondent for a salary increment and it instead terminated his contract without prior notice.
3. The Respondent filed a Memorandum of Reply dated 15th December 2016 averring that the Claimant was summarily dismissed for disciplinary issues as a result of a disciplinary hearing. It avers that since



the Claimant's employment was based on an oral contract, he was not entitled to house allowance and that he is further not entitled to any other sums as he accepted Kshs. 50,000/- as an appropriate payment for his terminal benefits. It further avers that the Claimant was habitually drunk and also habitually absent from his place of work in spite of several warnings being issued to him and that it had justifiable and legitimate reasons to terminate his employment. The Respondent prays that the court makes a finding that the Respondent did terminate the employment contract of the Claimant fairly and to dismiss the Claimant's claim for wrongful dismissal with costs.

Claimant's Submissions

4. The Claimant submits that no valid reason was advanced by the Respondent for his termination and neither was he given an opportunity to defend himself on the decision of the Respondent. He submits that Section 43 of the *Employment Act* obliges every employer to prove the reasons for termination of employment and where the employer fails to do so, the termination will be deemed to have been unfair. The Claimant submits this position was further well captured in the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR where the Honourable Court stated that for a termination of employment to pass the fairness test, it ought to be shown that there was both substantive justification and procedural fairness. The Claimant cites the case of *James Kabengi Mugo v Syngenta East Africa Limited* [2013] eKLR where the Court held that the *Employment Act*, 2007 makes it obligatory for employers to substantially justify termination decisions, and to carry out the termination in a procedurally fair manner. He also relies on the case of *Kenfreight (EA) Limited v Benson K Nguti* [2016] eKLR where the Court of Appeal opined on an employer issuing proper notice according to the contract and explaining to an employee in the presence of another employee or a union official, in a language the employee understood, the reason or reasons for which the employer was considering termination of the contract. Additionally, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service was taken. It is the Claimant's submission that he was therefore dismissed unfairly and that the termination was not based on his conduct, capacity or compatibility as provided under Section 45(2) (c) of the *Employment Act*.
5. He further submits that due process was not followed in so far as termination of his services on account of poor performance and incompetence is concerned. On the issue of drunkenness, he invites this Court to adopt the finding in the case of *John Rioba Mugo v Riley Falcon Security Services Limited* [2017] eKLR where the Court observed that drinking or smelling of alcohol per se was not a ground for summary dismissal. The Claimant submitted that further in *Kenya Science Research International Technical and Allied Workers Union (KSRITWU) v Stanley Kinyanjui and Magnate Ventures Limited* (Industrial Court, Case No. 273 of 2010) (unreported) the Court held that once poor performance of an employee is noted, the proper procedure is for the employer to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time of about 2 to 3 months. On the applicable principles and procedures on termination of employment for poor performance and incompetence, he refers the Court to the authorities of *Jane Samba Mukala v Ol Tukai Lodge Limited* [2013] eKLR by the Court of Appeal; *Banking Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Limited & another* [2016] eKLR; and *Agnes Yabuma Digo v PJ Petroleum Equipment Limited* [2013] eKLR. He submits that none of the said prerequisites of the law was complied with as he was never afforded the requisite facilities and personnel to facilitate the acquisition of his performance targets nor afforded appropriate disciplinary process. It is submitted by the Claimant that notably no report was made at the police station nor a case ever filed against him on the allegations of theft and that no investigations have ever been conducted since then. He refers the Court to the holding in the case of *Loice Otieno v Kenya Commercial Bank Limited* [2013] eKLR where the court opined that the doctrine of natural justice or procedural fairness is now an essential part of



an employment relationship and therefore, an employer has to comply with the procedures set out in section 41 of the [Employment Act](#), even in circumstances where instant dismissal was contemplated on the grounds of gross misconduct. The Claimant submits that in the instant case, the Respondent only adduced one warning letter which is not signed anywhere indicating that the Claimant received it and that if indeed there was misconduct on his part, the Respondent did not comply with the parameters set out in Section 41 of the [Employment Act](#).

6. He submits that he is thus entitled to 12 months' salary compensation having established that his employment was terminated unfairly and he relies on the cases of *Vitalis Omondi Othun v National Water Conservation & Pipeline Corporation* [2013] eKLR and *Alice Njoki Miringu v Barclays Bank of Kenya Limited* [2014] eKLR. On the claim of notice pay as under Section 36 of the [Employment Act](#), he relies on the case of *CMC Aviation Limited v Mohammed Noor* [2015] eKLR where this Court held that despite a finding of unfair termination of employment, the fact that the employment contract was terminable by one month's notice meant an award of one month's salary in lieu of notice was reasonable compensation. He submits that the period of 60 months he had worked for the Respondent was an uncontroverted fact and it was the Respondent's responsibility to ensure that every employee takes the annual leave when due or make payment in lieu thereof. He submits that he was entitled to twenty-one days annual leave with full pay every year as under Section 28 of the [Employment Act](#) and Regulation 9 of the *Regulation of Wages (General) Order* and that he is also entitled to a certificate of service under Section 51(1) of the Act and that costs follow the event.

Respondent's Submissions

7. The Respondent submits that there were justifiable reasons to terminate the Claimant and that applied both substantive and procedural fairness in dismissing the Claimant. On this submission it relies on the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR. The Respondent submits that it duly complied with Section 43 of the [Employment Act](#) but on the Claimant's part, he did not provide any evidence justifying that the acknowledgement of payment by him was not authentic. It submits that the Claimant is thus not entitled to further terminal benefits further because he did not provide any evidence proving his claims for overtime including public holidays, and annual leave. The Respondent submits that the burden of proof for the said claims cannot be pushed to the Respondent as alleged by the Claimant during the hearing and that it relies on the case of *Julius Mutana Ngigi v Cobra Security Company Limited* [2021] eKLR. It submits that in terms of the claim for house allowance it relies on the case of *Robai Musinzi v Mohammed Safdar Khan* [2012] eKLR and Section 31(1) of the [Employment Act](#). The Respondent submits that the Claimant was not entitled to house allowance since the same was provided to him by the Respondent through a reasonable housing accommodation at the Wilson Camp. It is the Respondent's submission that the Claimant has failed to establish that his termination was unfair or unlawful.
8. The Claimant was employed by an oral contract and served the Respondent at its Wilson Camp. From all accounts the Claimant was not paid house allowance but was housed at the camp. This resolves the issue of non-payment of house allowance as Section 31 of the [Employment Act](#) makes provision that where the employer provides reasonable accommodation the employee cannot claim house allowance. As regards the claim of unfair termination, it is common ground that the Claimant was terminated on June 30, 2016. He however was paid a sum of Kshs. 50,000/- and he signed a letter on 14th September 2016 after a conciliation meeting held on September 5, 2016 where he accepted the sum of Kshs. 50,000/- from the Respondent and stated that he would not make any other claim from the Association. He considered the matter as closed. It therefore was erroneous for him to mount a suit that has clogged the justice system when it had no basis being in court. The suit is thus dismissed with costs to the Respondent as the Claimant had waived any further claims after he was paid the handsome



sum of Kshs. 50,000/- despite having been found to be intoxicated while at work and causing the Respondent's members loss and/or damage to property. Suit dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE 2022

NZIOKI WA MAKAU

JUDGE

