



**Butoyi v Sheer Logic Management Consultants Ltd (Cause
274 of 2019) [2022] KEELRC 1456 (KLR) (13 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1456 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 274 OF 2019
NZIOKI WA MAKAU, J
JUNE 13, 2022**

BETWEEN

CHRISTINE BUTOYI CLAIMANT

AND

SHEER LOGIC MANAGEMENT CONSULTANTS LTD RESPONDENT

JUDGMENT

1. The Claimant filed this Claim against the Respondent vide a Statement of Claim dated 16th April 2019. She avers that the Respondent appointed her to the position of a Human Resource Officer vide a contract dated 21st July 2009 at a starting salary of Kshs. 45,000/- and that by a contract dated 8th May 2010, her contract was renewed at a salary of Kshs. 50,000/- and the contract thereafter lapsed on 20th January 2011. The Claimant avers that she nevertheless continued working for the Respondent without any contract or specified terms until when her services were terminated for alleged poor work performance and negligence. It is her averment that at the time of termination she was earning a basic pay of Kshs. 84,597.41.
2. The Claimant further avers that events prior to her termination were orchestrated by one Ken Kaunda who always lamented that she was being paid a lot of money for one individual and thus solely purposed to have her out of the Respondent company. The Claimant avers that she received warning letters on 17th July 2015 for poor work attitude and performance and others on 31st October 2016 and 28th February 2017 and that she was orally asked to do write-ups on 27th February 2017 and 3rd March 2017. The Claimant avers that on 14th July 2017, she was given a show cause letter which she responded to and was thereafter invited to a disciplinary hearing on 21st July 2017 whose decision she contends was never communicated to her. The Claimant avers that she also responded to other show cause letters received on 4th April 2018 and on 27th April 2018 and attended a disciplinary hearing and that on 11th June 2018, she received feedback from the hearing together with a warning letter dated 23rd May 2018. The Claimant avers that on 2nd July 2018 she was given another show cause letter dated 26th June 2018



and her services were thereafter terminated on 9th July 2018. The Claimant avers that her termination from service was unfair as the allegations against her could not be attributed to her because she had fully explained and exonerated herself from blame. She contends that the Respondent's show cause letters were randomly issued to her and were not unique as the Respondent was in the habit of issuing to its employees numerous and unjustified show cause and warning letters for purposes of intimidation. The Claimant avers that she was not afforded an opportunity to be heard and neither should she suffer for alleged wrongdoings she did not commit. She further avers that she has suffered great economic loss, damage and prejudice as a result of the unlawful and wrongful termination. She thus seeks one month's salary in lieu of notice, overtime and gratuity pay for the 9 years worked, house allowance from February 2011 to July 2018, 12 months' compensation for wrongful loss of employment, and a certificate of service as outlined in her Statement of Claim.

3. The Claimant further prays for an Award/Judgment against the Respondent for a declaration that she was unfairly and wrongfully terminated, an order for the payment of all her terminal benefits and compensation, costs and interest at Court rates. The Claimant also filed two witness statements by her and Stephen Amadalo whom she used to report to at the Respondent company. Mr. Amadalo states that he had a cordial relationship with the Claimant and had no issue with her work performance and that the Claimant is a hard worker. He confirms that the said Ken Kaunda was not in agreement with how much the Claimant was earning and that he (Amadalo) was tasked to draft vague show cause letters to the Claimant on a number of occasions. That he used to notify the Claimant on the intentions of Ken Kaunda and they would arrange for her disciplinary hearing on short notice so that she attends the same unprepared. He further asserts that the Claimant would take the sessions positively and would even come up with suggestions on how to improve service delivery. He states that as the substantive Human Resource Manager in place, he was not consulted or notified of such drastic action to terminate the Claimant with payment of one month notice. That his raising issue with the top management it did not also auger well with Ken Kaunda.
4. In her supplementary witness statement made on 13th September 2019, the Claimant asserts that she did not have a job description and at no point was she ever subjected to performance evaluation to ascertain her inability to perform work as alleged. She states that the minutes of the disciplinary meeting held in July 2017 were never signed and the recommendations made therein by the committee were never implemented. That the committee at the final hearing recommended that she be removed from the position she was occupying and did not state that she be removed from employment. That the director going ahead to draft a termination letter was therefore highly irregular considering that there was in place a substantive Human Resource Manager.
5. The Respondent filed its Memorandum of Response dated 24th June 2019 averring that it was prompted to issue the Claimant with warning letters for: her poor attitude towards work which was not changing; failure to follow instructions and pay incentives to the Respondent's employees; failure to pay the Respondent's employees on time; continued data inaccuracy; and poor treatment to the Respondent's employees. It avers that in one of the Claimant's hearing, the key issue was that her attitude to work needed to be addressed as it had great impact on the Respondent's business as a whole but that it nevertheless gave her another chance on reassignment. The Respondent avers that on a different occasion, the Claimant was accused of careless and inaccurate payroll information with glaring irregularities and in her response to the show cause, she cited misunderstandings and apologised for the same. The Respondent avers that yet again on another show cause letter issued to the Claimant, a subsequent report and minutes of the disciplinary meeting on the outcome of the same were filed, to the effect that the Claimant needed to address her breached lest a stern disciplinary action be taken against her. The Respondent avers that the Claimant went through another round of disciplinary action for breach of the Respondent's payroll duties that caused the Respondent's employees to miss



their salary and potentially caused material breach of the Respondent's contractual mandate to its clients. The Respondent avers that the disciplinary committee unanimously agreed that the Claimant was yet again negligent in her work and not ready to change despite the several chances accorded to her.

6. It is the Respondent's averment that considering the aforementioned, it is clear that the Claimant's actions gave it good reason to lawfully terminate her employment on reasons beyond poor work performance and negligence. The Respondent avers that it subsequently paid the Claimant her final dues to which she acknowledged receipt in her July 2018 payslip. It denies the particulars of unlawfulness/wrongful termination and the terminal dues as set out in the Claim and prays that this Claim be dismissed with costs. The Respondent's averments are supported by the filed a Substituted Witness Statement made on 11th November 2021 by Mr. Ben Lanya.
7. In response, the Claimant filed a Reply to Memorandum of Response dated 13th September 2019, averring that it reached a point where she received letters from two directors which made it difficult for her to know whom she was reporting or answerable to. That her request to have a witness sit in at the disciplinary hearing was granted after the meeting took place and that the allegations against her were most of the time abstracts and generalized statements without any factual backing. She prays that the Response be struck out and judgment be entered in her favour as prayed.
8. The Claimant and the Respondent's witness Mr. Ken Kaunda testified and nothing much turned on the oral testimony which was a rehash of the pleadings before the Court. Thereafter parties were to file submissions.
9. Claimant's Submissions

The Claimant submits that the law in Section 43(1) of the [Employment Act](#) 2007 calls for proof of reasons for termination by an employer and the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45. She submits that in all the five allegations listed in the termination letter, no specific facts were given to her and none was presented before this court to fortify the reasons advanced as warranting termination and loss of a livelihood. The Claimant submits that the termination letter was drafted without the existence of a known offence and that it should be known that she was not the receptionist nor the accountant for her to be blamed for wrongs of not attending to customers and remitting payments respectively. The Claimant urges this Court to find that the Respondent did not have any valid or justifiable reason to terminate her services in the manner it did. She relies on the cases of [Edward Juma Masakba v National Environment Management Authority](#) [2014] eKLR and [James Kariuki Wanyamba v Kagumo Teachers College](#) [2015] eKLR.

10. The Claimant submits that where an employer terminates an employee on alleged poor work performance, the procedure is equally provided for in Section 41(1) and (2) of the [Employment Act](#) 2007. She submits that the employer shall explain to the employee in a language the employee understands, the reason for which the employer is considering termination and shall hear and consider any representation which the employee and the person, if any, chosen by the employee, may make on the ground of misconduct or poor performance. She submits that in the instant case no evidence whatsoever was adduced to show that the claimant was given ample opportunity to articulate herself and exonerate herself of the allegations levelled against her. Relying on the holding in [Fredrick Odongo Owegi v CFC Life Assurance Limited](#) [2014] eKLR, the Claimant submits that procedure adopted by the Respondent in terminating her employment was not fair and that Section 45(2)(c) of the [Employment Act](#) provides that a termination of employment by an employer becomes unfair if the employer fails to prove that the employment was terminated in accordance with fair procedure. It is the Claimant's case that the termination/dismissal was unfair, wrongful and unprocedural.



11. The Claimant submits that having that her termination was unmerited and devoid of procedure, she is entitled to one month's notice pay as per Section 35(1)(c) of the [Employment Act](#) and compensation for wrongful or unfair termination. She submits that the Respondents adduced a payslip showing tabulation of her terminal dues and salary in lieu of notice was not paid. She further submits that the Respondent did not dispute the claim for overtime and since it failed to avail her clock in and out data sheet and evidence that she was paid overtime, she should adequately be compensated for the same. On the issue of an unchallenged claim for overtime, she relies on the holding in [Abigael Jepkosgei Yator & Another v China Hanan International Co. Ltd](#) [2018] eKLR. The Claimant submits that as her increments in salary and or duties were never reduced in writing after lapse of contract contrary to Section 9 of the [Employment Act](#), she has payslip for June 2018 showing that she was paid salary exclusive of any allowances. She submits that faced with a similar situation, the Court in [Milkah Khakayi Kulati v Sandstorm \(Africa\) Ltd](#) [2014] eKLR awarded house allowance for 30 months and 17 days. The Claimant submits that this Court should find that there being no contractual terms governing her and the Respondent and considering her testimony that the basic salary was not inclusive of house allowance and she was not housed by the Respondent, her claim for house allowance is merited. She further submits that Compensation for wrongful or unfair termination is well covered for under the provisions of Section 49(1)(c) of the [Employment Act](#) and that looking at the conduct of the Respondent and all the circumstances of this matter, this is a fit and proper case for the award of twelve (12) months' salary compensation. She submits that mediation attempts collapsed at the instance of the Respondent and that the prayer for payment of costs of this suit in favour of the claimant is thus well grounded.
12. Respondent's Submissions
- The Respondent submits that before an employer terminates the services of an employee, the threshold that must be met is procedural fairness is as stipulated under Sections 41 and 45 of the [Employment Act](#) and substantive justification as stipulated under Sections 43 and 45 of the [Employment Act](#). It relies on the case of [David Gichana Omuya v Mombasa Maize Millers Limited](#) [2014] eKLR where the Court affirmed the requirements of Section 41 of the [Employment Act](#) as the rules of natural justice and the pedigree for procedural fairness. It submits that from all the instances of the Claimant's disciplinary cases pleaded, it has shown both the substantive justification and procedural fairness in terminating the Claimant's employment. It further relies on the case of [Walter Ogal Anuro v Teachers Service Commission](#) [2013] eKLR where the Court held that for a termination to pass the fairness test there must be both substantive justification and procedural fairness. On procedural fairness, the Respondent further cites the cases of [Naima Khamis v Oxford University Press \(EA\) Limited](#) [2017] eKLR and [Kennedy Mutuku Mwove v M-Kopa Kenya Limited](#) [2021] eKLR.
13. It is the Respondent's submission that the Claimant is not entitled to the reliefs sought as she had one too many administrative lapses, data, employee and salary inaccuracies and poor work attitude as exhausted by the Respondent. The Respondent submits that the Claimant is seeking an unjust enrichment from the prayer for payment of terminal benefits as the same was duly paid to her and she ought not to be seeking it. On overtime, it submits that Section 27 of the [Employment Act](#) impresses upon every employer to regulate the working hours of employees and ensure that they are entitled to at least one day to rest. Further under Rule 5(2) of the [Labour Institution Act](#) No. 12 of 2007 (subsidiary legislation) Regulation of Wages (General Order) indicates that the normal working week shall consists of not more than fifty-two (52) hours of work spread over six days of the week. That in the case of [Katiezo Aligulab v Eldomat Wholesale & Supermarket Limited](#) [2016] eKLR, the Court held that the formula for calculating overtime has been expressly provide for under Rule 6 of the Regulation of Wages (General) Order. It submits that the Claimant did not demonstrate to court how she arrived at



the sum for overtime apart from just averring that she has worked overtime for 9 years and that she did not exhibit any evidence in contradiction of the Respondent's stipulated working hours.

14. On the issue of house allowance, the Respondent submits that there was no contractual provision for house allowance and it thus paid the Claimant a consolidated pay as evidenced by the pay slips produced by both parties. It cites the case of *Joseph Sani Orina v Hiprora Business Solutions (EA) Limited* [2017] eKLR where the court held that gross salary as opposed to basic salary usually includes house allowance and that the claimant was thus correctly paid a consolidated salary and not entitled to house allowance. It is the Respondent's submission that having demonstrated that the Claimant's termination was valid and with justifiable cause, this court should be guided in the interpretation as authorized by Section 50 of the *Employment Act*. The Respondent submits that from the Claimant's conduct, her response to show cause letters, the various disciplinary minutes, deliberations made on the last disciplinary minutes, her response and conduct thereafter and all the circumstances in this matter considered, she played a big role in termination of her employment and suffered no economic injustice to accord her a 12- months' salary compensation. The Respondent prays for costs because it followed the law in terminating the Claimant's services and accurately paid her all the final dues.
15. The Claimant was dismissed after a series of show cause letters. These show cause letters were unrelenting and were replete with the same grouse. It would seem the Claimant was correct in her surmise that the Respondent hatched a plot to end her contract hence the series of show cause letters which she responded to the satisfaction of the employer save for the end when a decision to terminate was made. Her immediate supervisor confirmed that the Claimant was a performer and that he had no issues with her. One wonders then where the employer got the impression she was not delivering. In the Court's view, the Claimant was hounded out of her job. As she was not given a critical component of fairness as espoused in the case of *Walter Ogal Anuro v TSC* (supra) cited by the Respondent, she would be entitled to remedy. The Claimant was not given substantive justice as she was merely taken through the steps so that the employer could allege it gave her procedural fairness. As held in that case for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. There was no such demonstration by the Respondent thus rendering the dismissal unfair in terms of Sections 43 and 45 of the *Employment Act*. The Respondent also admitted to paying the Claimant dues that were not itemised. There was no contract indicating that she was entitled to receive a consolidated pay which would encompass her basic pay as well as house allowance. She thus would be entitled to claim house allowance for the period between July 2017 and July 2018 when her contract ended. This is because between 2011 and 2017 she never raised the issue of payment of house allowance as required thus disentitling her to the same for the period prior to July 2017. She will also have costs of the suit. In the final analysis I enter judgment for the Claimant:-
 - i. A declaration that her termination was unfair and unlawful entitling her to 6 month's salary as compensation (6 months x 97,297.02 (basic + house allowance) – Kshs. 583,722.12
 - ii. Unpaid house allowance (15% of basic pay – Kshs. 84,597.41) for 12 months – Kshs. 152,275.34
 - iii. Costs of the suit
 - iv. Interest on the sums in (i) and (ii) above at Court rates from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE 2022



NZIOKI WA MAKAU
JUDGE

