



**Aboka v Shalom Paradeisos (Cause 1900 of 2017)
[2022] KEELRC 1484 (KLR) (10 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1484 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1900 OF 2017**

SC RUTTO, J

JUNE 10, 2022

BETWEEN

HENRY ABOKA CLAIMANT

AND

SHALOM PARADEISOS RESPONDENT

JUDGMENT

1. The Claimant initiated the suit herein vide a memorandum of claim filed on 4th September, 2017 and through which he avers that he was unfairly and maliciously terminated from employment on 7th June, 2017 without any valid reason, audience and without payment of his terminal dues. It is against this background that he seeks the sum of Kshs 553,750/= being notice pay, compensatory damages for wrongful termination, leave allowance, house allowance and service pay.
2. The respondent entered appearance through the firm of GSLAW LLP Advocates but did not file any defence or such other document in response to the claim.
3. The Court on its own motion caused the matter to be mentioned on 2nd November, 2021 for purposes of taking directions on the hearing of the suit. On the said day, the respondent was absent from Court hence the Court directed that the matter proceeds as undefended noting that there was no response to the Claim. A hearing date for 9th March, 2022 was subsequently allocated.

Claimant's Case

4. On 9th March, 2022, the matter came up for hearing and the claimant took the stand and testified in support of his case. At the outset, the claimant sought to rely on his witness statement and bundle of documents filed together with his claim, and thus asked the court to adopt the same to constitute part of his evidence in chief. The said documents were also produced as exhibits before court.



5. As per the claimant's testimony, he was employed by the respondent sometimes in April, 2014, as a chef in its cafeteria. That his monthly salary was Kshs 25,000/=.
6. He testified that on 7th June, 2017, he reported to work in the morning and found the MPesa business which was within the respondent's premises, open. That he informed the caretaker who in turn called the person responsible for the MPesa shop. That it was later ascertained that some money was missing from the said MPesa shop, and this led to his arrest and detention at Kileleshwa Police Station.
7. He testified that he was later released after he was found innocent. That the respondent terminated his employment following his release from the police station.
8. He denied any involvement in the theft from the MPesa shop. He further denied being negligent at work and stated that during the 3 years he had worked for the respondent, he had never been warned either verbally or in writing. It was also his testimony that contrary to the respondent's assertions in its response to the demand letter, he was never abusive to the female staff at the workplace. He further informed Court that during the 3 years he had worked for the respondent, he never proceeded on leave and that he used to report to work at 5:30 am and leave at 8:00 pm, but was not remunerated accordingly.
9. As there was no appearance by the respondent, the claimant's case closed upon his testimony in chief.

Submissions

10. The claimant filed written submissions through which he stated that his termination was unfair both in substance and procedure. He placed reliance on the provisions of section 45 and 41 of the [Employment Act](#).

Analysis and Determination

11. From the pleadings on record as well as the evidence placed before court, the issues falling for the court's determination are;
 - a. Was the claimant's termination unfair and unlawful?
 - b. Is the claimant entitled to the reliefs sought?

Was the Claimant's Termination Unfair and Unlawful?

12. The claimant has alleged that his termination was substantively and procedurally unfair. In the circumstances, it is necessary to consider the facts and circumstances appertaining this case vis a vis the relevant provisions of the [Employment Act](#).
13. Section 43(1) of the [Employment Act](#) (Act), places the burden of proving reasons for termination on an employer and failure to do so, renders such termination as unfair. In addition, section 45 (2) of the Act, qualifies a termination of employment as unfair where the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer. This constitutes substantive justification and is also the first limb towards proving that a termination was fair.
14. The second limb which constitutes fair process, is to be found in section 45 (2) (c) of the Act. This provision requires an employer to prove that it complied with the requirements of fair process in terminating the services of an employee. Section 41(1) of the Act elaborates what entails fair procedure. In line with this, an employer is required to notify an employee of the intended termination in



a language he or she understands and in the presence of another employee or a shop floor union representative.

15. In a nutshell, an employer must justify that there was reason to terminate the services of an employee and that such termination was undertaken in accordance with fair procedure.
16. In this case, the claimant's termination was effected through a letter dated 7th June, 2017 which I will reproduce hereunder;

“REF: Summary of Dismissal (sic)

I am writing to confirm that, following a disciplinary hearing held on 6/6/2017, it was decided that your employment with Shalom Paradisos(sic) should be terminated without notice for negligence. The reason for your dismissal is that on Monday June 5th 2017 after opening work, you found the Mpesa shop open, after reporting the matter you knowingly decided to close the mpesa shop after being directed by one staff member. You however denied the above incident when queried upon and changed your statement twice leading to the loss of funds from the cafeteria. The untrustworthiness shown during this time resulted in the committee approving your dismissal. This was a serious breach of your obligations such as to warrant dismissal without notice and without any further warnings.

17. From the above letter, it is apparent that the claimant was terminated on account of negligence and lack of trust.
18. In light of the provisions of section 43(1) of the Act, the respondent was required to prove the reason for the claimant's termination. Further, in terms of section 45 (2) (a) and (b), such reasons ought to meet the fairness and validity threshold.
19. As stated herein, the matter was not defended hence the respondent did not present evidence to justify the reasons for the claimant's termination. As such, the claim by the respondent that the reasons for his termination were substantively unfair, remained uncontroverted.
20. As regards procedural fairness, it is noteworthy that the claimant's letter of termination states in part: “...it was decided that your employment with Shalom Paradisos should be terminated without notice for negligence...this is a serious breach of your obligation such as to warrant dismissal without notice and without any further warnings”
21. This is a case where the facts speak for themselves, as it is evident that the claimant was terminated without any notice.
22. The Court of Appeal analyzed the import of the provisions of section 41 of the [Employment Act](#) in the case of [Postal Corporation of Kenya vs Andrew K. Tanui \[2019\] eKLR](#), as follows: -

“It is our further view that Section 41 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” in the following manner: -

- (“1) Subject to Section 42 (1), an employer shall before terminating the employment of an employee, on the grounds of misconduct; poor to 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 employer 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, chosen by the employee within subsection (1) make.”

Section 42 (1) referred to in Sub-section (1) relates to employees on probation.

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.”

23. I fully adopt and reiterate the above position particularly on the mandatory nature of the provisions of section 41 and the fact that said section 41 only prescribes the minimum standards of a fair process.
24. Therefore, it is not open for an employer to diminish the requirements stipulated thereunder. It was therefore improper for the respondent to terminate the claimant’s employment without subjecting him to a fair process. This was clearly in violation of the section 41 of the Act.
25. In light of the foregoing, and having found that the respondent has not proved the reasons for the claimant’s termination, and taking into account that the termination was without notice, the Court arrives at the inescapable conclusion that the claimant’s termination did not meet the legal threshold set out under the [Employment Act](#).
26. In the circumstances I find and hold that the claimant’s termination was unfair and unlawful in terms of section 45 of the [Employment Act](#).

Available Reliefs

27. Having found that the claimant’s termination was unfair and unlawful, I will award him five (5) month’s gross salary as compensatory damages. This award is informed by the length of the employment relationship.
28. I further award the claimant one (1) month’s salary in lieu of notice.
29. The claimant is also awarded service pay for three (3) years as the respondent intimidated in its response to the demand letter, that he was entitled to the same.
30. As regards, the claim for leave allowance, I will decline to make any award as entitlement to the same, was not proved.
31. The claim for house allowance is similarly declined as his monthly pay was above the minimum salary stipulated under the relevant Wage Order. It is therefore presumed that the House allowance was subsumed in his salary of Kshs 25,000/=.



Orders

32. Accordingly, I enter Judgment in favour of the claimant against the respondent as follows;
- a. An award of Compensatory damages in the sum of Kshs 125,000.00 which sum is equivalent to 5 months gross salary.
 - b. An award of one month's salary in lieu of notice being Kshs 25,000.00.
 - c. An award of service pay for 3 years being Kshs 18,750.00
 - d. The total award is Kshs 168,750/=.
 - e. Interest on the amount in (d) at court rates from the date of Judgement until payment in full.
 - f. The claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2022.

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Khalwale

For the Respondent No appearance

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 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 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

