



**Chimbagu v A. Niaz & Sons Limited (Cause 630 of 2016)
[2022] KEELRC 1115 (KLR) (9 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1115 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 630 OF 2016**

**AK NZEI, J
JUNE 9, 2022**

BETWEEN

BAKARI BOKI CHIMBAGU CLAIMANT

AND

A. NIAZ & SONS LIMITED RESPONDENT

JUDGMENT

1. The suit herein was filed by the Claimant on 26th August 2016 vide a Memorandum of Claim dated 25th August 2016. The Respondent entered appearance on 7th October 2016 and filed a statement of defence on the same date.
2. On 30th September 2019, the Claimant filed an amended Memorandum of Claim dated 26th September 2019. The Claimant led, inter alia,
 - a. that on 5th August 2008, the Claimant was employed by the Respondent as a Mechanic in charge of the Respondent's Mombasa Branch at a monthly salary of ksh.15,000, which was eventually increased to ksh.35,000 per month by December 2014.
 - b. that vide a transfer letter dated 23rd September 2015, the Claimant was transferred from Mombasa to Nairobi, Kithimani site, where he was required to report on 1st October 2015.
 - c. that in December 2015, the Respondent management informed the Claimant that his salary had been increased from ksh.35,000 per month to ksh.40,000 per month with effect from January 2016, but the increment was never effected.
 - d. that on 18th February 2016, the Claimant reported on duty at 8.30 a.m. and without any lawful cause, the Respondent's director, a Mr. Assad Niaz, chased the Claimant away and told him that he had sacked him, and should leave the company premises immediately, and never to go back.



- e. that the Claimant claimed compensation for unlawful dismissal and the mental torture he underwent during the dismissal period.
3. The Claimant sought the following reliefs:-
- a. Unpaid salary for days worked from 1st February 2016 to 18th February 2016 (35,000/30x18 days)ksh.21,006.
 - b. 12 months' salary for unlawful terminationksh.420,000
 - c. Three months noticeksh.105,000
 - d. Unpaid leave from 2009 to 2015 (35000x7).....ksh.245000
 - e. Gratuity worked for 7 years (35,000x7).....ksh.122,000
- Total_ksh.913,506
4. The Claimant also prayed for costs of the suit and interest.
5. The Respondent is not shown to have filed an amended statement of defence/response. In the statement of defence dated 29th September 2016 and filed in Court on 7th October 2016, the Respondent, inter-alia:-
- a. admitted having employed the Claimant as pleaded, but denied having increased his salary from ksh.35,000 to ksh.40,000.
 - b. denied having terminated the Claimant's employment orally and pleaded that the Claimant's suit had been instituted prematurely.
 - c. pleaded that the Claimant had absconded duty, and that his dismissal, if at all, was summary and fell under Section 44(1) of the Employment Act 2007.
 - d. denied the Claimant's claim.
6. On 15th December 2020, the Respondent filed a list of documents, dated 11th December 2020, and a witness statement by Assad Niaz dated the same date.
7. On his part, the Claimant filed a supplementary list of documents on 19th May 2021, dated 18th January 2021, and a further witness statement dated the same date. These were filed in addition to the Claimant's list of documents and witness statement dated 25th August 2016 and filed in Court on 26th August 2016.
8. When trial opened on 27th May 2021, the Claimant adopted his witness statements as his testimony and produced the documents filed. The witness statements adopted by the Claimant basically replicated the averments made in the amended memorandum of claim.
9. The filed documents, which the Claimant produced in evidence, included a job Port User Movement Control Pass and a transfer letter, among others.
10. Cross-examined, the Claimant testified that he was terminated by Assad the director, and that he currently works in a company where Assad is director (Naiz Earthworks). The Claimant further testified that he was unfairly terminated.
11. The Respondent called one witness, Assad Niaz, who told the Court that he worked with the Claimant in the Respondent Company where the witness was a director. The witness (RW-1) adopted his witness statement dated 11th December 2020 as his testimony.



12. RW-1 testified that he registered another company (Niaz Earthworks Limited) and moved with the Claimant to that company. That the Claimant was not terminated; and that RW-1 had learned of this claim through his co-director in the Respondent Company.
13. The witness (RW-1), further told the Court that he had nothing to show that the Claimant ever proceeded on leave, and that the Claimant was earning a basic salary of ksh.35,000, which was exclusive of allowances paid to the Claimant when he travelled.
14. Parties did not file a joint statement of agreed issues. In my view, issues for determination in this matter are as follows:-
 - a. Whether the Claimant's employment with the Respondent was terminated by the Respondent.
 - b. Whether termination of the Claimant's employment was unlawful and therefore unfair.
 - c. Whether the Claimant is entitled to the reliefs sought.
15. On the first issue, the Respondent admitted having employed the Claimant as pleaded by him, but denied having terminated the Claimant's employment. The Respondent pleaded at paragraph 7 of its statement of defence that the Claimant absconded from his contractual duties and never reported back to work. The Respondent further pleaded at paragraph 10 of its statement of defence that in the alternative, if at all the Claimant was terminated, his termination falls within the ambit of summary dismissal for absconding duty under Section 44(1) of the *Employment Act* 2007.
16. Absconding duty is a gross misconduct under Section 44 of the *Employment Act* and attracts summary dismissal of an employee absenting himself from duty without lawful cause. The Respondent would have been expected to invoke the provisions of Section 41 of the *Employment Act* if at all the Claimant absconded duty. Further, the Respondent did not tell the Court what action it took when the Claimant failed to report on duty, like sending out a notice to show cause and warning letters. It was held in the cases of *Stanley Omwoyo Oncheri V Bom Nakuru Ymca Secondary School* [2015] eKLR (cited in *James Ashiambi Namayi v Menengai Oil Refineries Ltd* [2016] eKLR) that:-

“the employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable enquiries as to the absence (post, email, phone calls, colleagues or family members) issuance of ultimatums to the employee to resume duty and the like. Each case will depend on its peculiar circumstances.”
17. Further, it was held in the case of *Godfrey Anjere V Unique Supplies Limited* [2015] eKLR as follows:-

“In a dismissal on account of absconding duties, the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse such as illness or circumstances beyond their control and yet unable to communicate to the employer in good time.”
18. On the other hand, the Claimant pleaded and testified that his employment was terminated by RW-1, a director in the Respondent Company, on 18th February 2016 after being transferred from Mombasa to Nairobi (Kithimani site) in October 2015. The Claimant produced the transfer letter in evidence.
19. I reject RW-1's evidence that he moved with the Claimant from the Respondent Company to a new company which the witness (RW-1) registered. Even if the Claimant was eventually employed



by another company associated with RW-1, this was after his termination by the Respondent. The Claimant testified that he was terminated by the director of the Respondent Company without reason and was not given a termination letter. It is my finding that the Claimant's employment with the Respondent was terminated by the Respondent.

20. On the second issue, for any termination of employment to pass procedural fairness test, the employer must be shown to have complied with the mandatory requirements of Section 41 of the [Employment Act](#), which provides as follows:-

“(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, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

21. In the case of [Cmc Aviation Limited V Mohammed Noor](#) [2015] eKLR, the Court of Appeal stated as follows:-

“In view of the foregoing, we find that the appellant's act of summarily dismissing the Respondent without giving him an opportunity to be heard amounted to unfair termination as defined under Section 45 of the [Employment Act](#). In Kenya Union Of Commercial Food And Allied Workers –vs- Meru North Farmers Ssacco Limited [2013] eKLR, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, the employee must be taken through the mandatory process as outlined under Section 41 of the [Employment Act](#). That applies in a case of termination as well as in a case that warrants summary dismissal. See also Mary Chemweno Kiptui V Kenya Pipeline Company Limited [2014] eKLR.”

22. Further in the case of [Kenfright \[E.A\] Limited v Benson K. Nguti](#) [2016] eKLR, the Court of Appeal held as follows:-

“apart from issuing a proper notice according to the contract (or payment in lieu of notice provided), an employer is duty bound to explain to an employee, in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, 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 is taken....We come to the conclusion and find, in agreement with the trial Judge, that the termination of the Respondent's contract of service in the circumstances, was unfair, the payment in lieu of notice notwithstanding...”

23. The Respondent did not demonstrate that it in any way complied with Section 41 of the [Employment Act](#) in terminating the Claimant's employment. This breach of statute made the termination unlawful, and therefore unfair. I so find and hold.



24. On the third issue, and having made a finding that termination of the Claimant's employment was unfair, I award the Claimant eight months' salary being compensation for unlawful and unfair termination of employment. I have taken into account the circumstances and the manner in which the Claimant's employment was terminated.
25. It was never disputed that the Claimant's monthly salary at the time of termination was ksh.35,000. This amount is indicated in the Claimant's transfer letter dated 23rd September 2015, and was admitted by the Respondent, both in its pleadings and in evidence. Eight month's salary will therefore be $ksh.35,000 \times 8 = ksh.280,000$.
26. The claim for ksh.21,006 being salary for days worked from 1st February 2016 to 18th February is allowed. The Respondent did not demonstrate that it paid salary for the days worked in February 2016.
27. The claim for three months' salary in lieu of notice is declined, and instead the Claimant is awarded ksh.35,000 being one month salary in lieu of notice pursuant to Section 35(1) (c) of the Employment Act.
28. On the claim for unpaid leave earned during the period of employment, the Respondent did not dispute, and indeed admitted (at paragraph 5 of the statement of defence) having employed the Claimant from 5th August 2008 to December 2015. The Claimant pleaded and testified that he never proceeded on leave during the period of employment. On the other hand, the Respondent (RW1) testified that he had nothing to show that the Claimant took leave. The Claimant completed seven years of service and has claimed unpaid leave for those 7 years. I award the Claimant an equivalent of 21 days' salary for each completed year of service, which is $ksh.24,500 \times 7 = ksh.171,500$.
29. The claim for gratuity for seven years of service is allowed pursuant to Section 35(5) of the Employment Act. The Claimant is awarded the sum claimed ($35,000 \times 7$) = ksh.122,500.
30. Ultimately, and having considered written submissions filed by counsel for both parties, judgment is hereby entered in favour of the Claimant against the Respondent as follows:-
 - a. Eight months' salary being compensation for unlawful and unfair termination of employmentksh.280,000
 - b. Salary for days worked from 1st February 2016 to 18th February 2016ksh.21,006
 - c. One month salary in lieu of noticeksh.35,000
 - d. Unpaid leave from 2009 to 2015ksh.171,500
 - e. Gratuity for seven completed years of serviceksh.122, 500

Total __ ksh.630,006
31. The awarded sum will be subject to statutory deductions under Section 49(2) of the Employment Act.
32. The Claimant is awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JUNE 2022

AGNES KITIKU NZEI

JUDGE

ORDER



In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

N/A for Claimant

Miss Kieti for Respondent

