



REPUBLIC OF KENYA



KENYA LAW
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**Ngui v Ireri Ndigwa t/a Links Place Pub and Restaurant (Cause
1677 of 2016) [2022] KEELRC 1656 (KLR) (6 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1656 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1677 OF 2016**

JK GAKERI, J

JUNE 6, 2022

BETWEEN

JULIUS MUSEE NGUI CLAIMANT

AND

IRERI NDIGWA T/A LINKS PLACE PUB AND RESTAURANT RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a memorandum of claim filed on 22nd August 2016 alleging unfair termination and non-payment of terminal dues.
2. The Claimant prays for –
 - i. A declaration that the Claimant’s termination by the Respondent was unfair and unlawful.
 - ii. General damages for loss of utility and earnings.
 - iii. Payment in lieu of notice.
 - iv. Salary for the month of February
 - v. Compensation for unlawful termination
 - vi. Severance pay
 - vii. Costs of this claim.
 - viii. Certificate of service.
 - ix. Punitive damages against the Respondent.
 - x. Interest on the above payments.



3. The Respondent filed a response to the statement of claim on 2nd November 2016 praying for dismissal of the suit with costs.

Claimant's Case

4. The Claimant avers that he was employed by the Respondent in October 2014 as a chef on permanent basis at Kshs.13,000/- per month.
5. That it was the duty of the Respondent to take reasonable steps to ensure his safety as he discharged his obligation as a chief by inter alia providing protective gear.
6. The Claimant states that on 16th February 2016, the electric deep fryer cooker he was using malfunctioned and blew up spilling hot cooking oil on the Claimant causing severe injuries and the Respondent offered no assistance.
7. Finally, the Claimant states that he reported the accident to the Manager, Mr. Dennis Munyoki who instructed him to seek first aid. That he proceeded to Pipeline Nursing Home where he was treated and discharged.
8. That on the same day one Josephine, the Supervisor, called to inform him that the Respondent had directed that he should not report back to work. That the summary discussion was unfair.

Respondent's Case

9. The Respondent filed its response to the statement of claim on 2nd November 2016 averring that it had taken the necessary precautions at the workplace and the Claimant has been provided with the requisite protective gear and denies that the cooking equipment was generally defective. It avers that the cooker was constantly inspected to ensure safety.
10. The Respondent further avers that the Claimant operated the cooker negligently which occasioned the injuries which the Respondent denies. Particulars of negligence include putting excessive oil in the cooker, failing to use the protective gear provided and lack of attention.
11. Finally, the Respondent avers that the Claimant absconded duty and acted negligently.

Claimant's Evidence

12. The Claimant's written statement which he adopted as evidence-in-chief replicates the contents of the memorandum of claim and makes no reference to any of the prayers except compensation for unlawful termination.
13. On cross examination, the witness stated that he had reported that the cooker was defective and it had been repaired previously. That he reported the accident to the Supervisor who called the Manager.
14. The witness further confirmed that he was called by the Supervisor and later found out that another person had been employed as a cook. That he was away for one week and was ready to continue working.
15. On re-examination, the Claimant stated that he was injured at 6.00 am on the right hand.
16. CW2, Mr. Dennis Kyenze Munyoki testified that his reporting time was 8.00 am. That on the material day he was called by the Supervisor and informed that the Claimant had been injured by oil. It was his testimony that the repairer confirmed that the cooker had overheated.



17. The witness told the Court that cooks had a 24 hour shift and no overtime was payable because they worked for 15 days per month.
18. That he had not instructed Josephine to inform the Claimant not to report to work. CW2 testified that he had authority to hire and fire employees. That he informed Julius that the Director had given instructions that he should not report to work because he used to sleep while at work. The witness testified that the Claimant was not paid anything.
19. On cross examination, the witness confirmed that he worked for the Respondent for 10 years and had a good relationship with the directors and the Manager. The witness further confirmed that he would recommend staff to directors for employment but had no written contracts.
20. It was his evidence that the hotel had a first aid box but was unaware whether the Claimant had been assisted. That he recommended that the Claimant proceeds to hospital for treatment.
21. Finally, the witness confirmed that although he had authority to dismiss employees, he did not dismiss the Claimant. That Josephine had no authority to suspend an employee.
22. On re-examination, the witness testified that the director terminated the Claimant's employment contract.

Respondent's Evidence

23. The Respondent, Mr. Joseph Ireri Ndwiga (RW1) adopted the written statement and was cross examined.
24. RW1 confirmed that he had delegated the power to hire and fire to the Manager depending on the level of the employee and had no role in hiring and firing of employees.
25. The witness confirmed that the establishment had four directors. That the Manager would recommend persons to the directors. That all employees had employment cards.
26. The witness further confirmed that the company had no information about the injuries sustained by the Claimant.
27. On re-examination, the witness testified that the Manager was responsible for hiring and firing of employees and that he had a cordial relationship with the Manager even after the business closed.

Claimant's Submissions

28. On 19th January, 2022 the Claimant's Counsel sought and was given leave to amend the memorandum of claim in respect of the amounts claimed under various heads. The Respondent had no objection.
29. On 21st February 2022, the Claimant had neither filed nor served the amended claim and submissions were not ready. The mention was recorded as the last at the instigation of the Claimant. The Respondent was absent.
30. On 20th April 2022, the Claimant had neither filed or served its submissions nor the amended memorandum of claim. The Respondent was absent.
31. The Court set the judgment date as 6th June 2022.
32. By 24th May 2022, when the Court retired to write this judgment, neither of the parties had filed submissions. The Claimant had in addition not filed the amended memorandum of claim.



33. In a nutshell, the Court did not benefit from the insights and perspectives of Counsel by way of submissions.

Analysis and Determination

34. The issues for determination are whether: -

- i. Termination of the Claimant's employment was unfair;
- ii. The Claimant is entitled to the reliefs sought.

35. As to whether termination of the Claimant's employment was unfair the first port of call is the evidence on record. In his evidence in chief, the Claimant testified that he was called by the Supervisor, one Josephine who told him that he should not report back to work.

36. In addition, he testified that after recovery from the injuries, he reported to work but the Supervisor Josephine informed him that the Director had directed that he should not return to the work place.

37. It was also confirmed that although the Claimant was hired by the Manager, he did not call him or the Director to confirm the supervisor's directions on termination of employment. That he had been away for one (1) week.

38. CW2 testified that he would recommend employees for hiring and could hire and fire but did not terminate the Claimant's employment. He admitted that he interviewed him for the job. It was his testimony that the Director had given instructions that the Claimant should not report to work because he had been sleeping while at work.

39. Relatedly, on the day the Claimant was injured, the witness testified that in his view, the burns were serious and recommended that the Claimant proceeds to hospital and facilitation was provided.

40. The Claimant testified that he was attended to at the Pipeline Nursing Home on 16th February 2016 but his letter from the hospital is dated 20th February 2016 and makes no reference to the date of visitation to hospital. In addition, Dr. Wandugu's report is dated 23rd February 2016, one week after the injuries were sustained.

41. Significantly, the evidence of CW2, the former Manager of the Respondent's business appears to confirm the Claimant's allegations that he was dismissed by the Supervisor one Josephine who according to the witness had no power to suspend or dismiss an employee. CW2 was categorical that although he had authority to hire and fire, he did not dismiss the Claimant. Moreover, it was his testimony that the Director had given instructions about the unsuitability of the Claimant.

42. RW1, Mr. Ireri Ndwiga was categorical that the four directors of the company had delegated the power to hire and fire employees at certain levels to the Manager.

43. However, in contradiction, RW1 confirmed on cross examination that he did not instruct the Manager on who, how and when to hire or fire. The Manager would originate the request and directors recommended but insisted that the Manager had the prerogative to dismiss employees.

44. The uncontroverted evidence of the Claimant is that he was dismissed without a notice to show cause or termination letter and no reason was provided. Contrary to the provisions of the *Employment Act*, 2007. Specifically, Sections 41, 43, 45 and 47(5). These provisions set forth the statutory architecture on the termination of employment contracts.



45. In *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, the Court of Appeal stated as follows:

“There can be no doubt 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.”

46. The Court is guided by these sentiments.

47. Needless to emphasise, the Claimant’s employment was terminated without adherence to the foregoing provisions of

law.

48. The Director inculcates the Manager for the dismissal. The Manager on the other hand disclaims/blames instructions from the director and is emphatic that he did not dismiss the Claimant.

49. Instructively, neither the Director nor the Manager allege that the supervisor did not call the Claimant or provide a counter narrative.

50. Regrettably, the Respondent did not call its former supervisor, Josephine to confirm or contradict the Claimant’s evidence.

51. It is the finding of the Court that termination of the Claimant’s employment was unfair for want of substantive justification and procedural fairness.

Reliefs

52. The Claimant prays for various reliefs which the Court addresses as follows:

a. Salary in lieu of notice

53. The Claimant testified that his salary was Kshs.13,000/- per month. The Respondent led no evidence on the Claimant’s salary. The sum of Kshs.13,000/- is awarded as pay in lieu of notice.

b. Salary for the month of February 2016

54. From the evidence on record, it is clear that the Claimant was not rendering services to the Respondent from the morning of 16th February 2016 when he was injured while on night shift.

55. In addition, the Manager confirmed that he was not paid after dismissal. The sum of Kshs.6,933/- is awarded as salary for the sixteen (16) days worked in the month of February 2016.

c. Compensation for unlawful termination

56. Having found that the Claimant’s dismissal by the Respondent was unfair for non-compliance with the provisions of the *Employment Act*, 2007. The Claimant is entitled to the discretionary remedy under Section 49(1)(c) of the *Employment Act* subject to observance of the provisions of Section 49(4) of the Act.



57. In arriving at the level of compensation for the unlawful termination of employment, the Court has considered the following: –
- i. The Claimant was an employee of the Respondent for a duration of one year and 3½ months, a relatively short time.
 - ii. The Claimant wished to continue in employment. This is exemplified by the fact that after recovery, he reported to the hotel but he was not welcomed by the Respondent and it had already hired another person.
 - iii. The Claimant did not contribute to the termination of his employment.
58. In the circumstances the equivalent of two months' salary is fair, Kshs.26,000/-.
- d. Severance pay, 15 years for three completed years
59. It is unclear what the Claimant is praying for in this case but for his benefit, the Court will construe it as severance pay and costs of this suit.
60. As regards severance pay, the Claimant led no evidence that he was declared redundant to qualify for severance pay, under Section 40(1)(d) of the *Employment Act*. The prayer is declined.
- e. Certificate of Service
61. Granted that the Claimant served the Respondent for one (1) year and 3½ months, he is entitled to a certificate of service by dint of Section 51 of the *Employment Act*.
- f. Punitive damages against the Respondent
62. The Claimant led no evidence of his entitlement to punitive damages. Relatedly, the Claimant made no sustainable allegation against the Respondent which would entitle him to punitive damages which is essentially awarded to punish a Respondent for its conduct. The prayer is declined.
63. In the final analysis judgment is entered for the Claimant against the Respondent in the following terms:
- a. One month's salary in lieu of notice Kshs.13,000
 - b. Salary for the days worked in February 2016 Kshs.6,933
 - c. Equivalent of two months' salary Kshs.26,000 Total award Kshs.45,933
 - d. Certificate of service to issue within 30 days of this judgment.
 - e. Costs of this claim
 - f. Interest at Court rates from the date of judgment till payment in full.
64. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH DAY OF JUNE 2022

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE

