



REPUBLIC OF KENYA



**Oyoo v Prideinn Hotels & Investments Limited (Cause 1029 of 2016)  
[2022] KEELRC 1319 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1319 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1029 OF 2016**

**JK GAKERI, J**

**JULY 21, 2022**

**BETWEEN**

**KEVIN AWUOR OYOO ..... CLAIMANT**

**AND**

**PRIDEINN HOTELS & INVESTMENTS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant initiated this claim by a statement of claim dated 20<sup>th</sup> May, 2016 and filed on 2<sup>nd</sup> June, 2016 alleging that he was unfairly dismissed from employment by the respondent and prays for:-
  - i. A declaration that the respondent's action of dismissing the Claimant from employment was unlawful and unfair.
  - ii. The sum of Kshs.360,000/= as compensation.
  - iii. Certificate of service.
  - iv. Costs of this suit.
  - v. Interest on the amount awarded at court rates.

**The Claimant's case is pleaded as follows;**

2. The Claimant avers that he was employed by the respondent on 16<sup>th</sup> November, 2012 as a Maintenance Manager at a gross salary of Kshs.20,000/= per month inclusive of house allowance subject to 3 months' probation and no formal contract was issued.
3. It is the Claimant's case that he was forced to carry out duties of an electrician, plumber, painter, mason, carpenter etc and discharged his duties with diligence and dispatch though not compensated for the extra services. That his request for salary increment was not responded to.



4. The Claimant further avers that in April, 2015, he was promoted to the management list of the company at a gross salary of Kshs.30,000/= but his pleas for a formal contract were ignored. That in mid-May 2015, the General Manager, Mr. Kimani informed him that the management had proposed to install electricity and fans in all rooms and the process would commence soon.
5. It is the claimant's case that he proceeded on leave and when he resumed, the project had commenced. He found the rooms in a pathetic condition and consulted the General Manager as the contractor had already left. That the General Manager informed him that the rooms would be painted in a particular pattern.
6. The Claimant avers that he gave Mr. Kimani the issues that needed to be attended. The Claimant took leave from 16<sup>th</sup> June, 2015 to 23<sup>rd</sup> June, 2015 and when he resumed, he found a new General Manager Ms Natasha who informed him that he had been transferred to the Westlands Branch and no reason was provided.
7. That after one week at the Westlands Branch, the Claimant complained to the Human Resource Manager, Mr. Nicholas Ochieng who agreed to send him back to the original branch. That a few days after reporting to the original branch, Ochieng and Ms Natasha requested the Claimant to meet them and when he arrived on 7<sup>th</sup> July, 2015, he was given a termination letter which indicated that his employment had been terminated for non-satisfactory performance of his duties.
8. The Claimant further avers that he was not given a warning letter or any warning or opportunity to be heard on the alleged unsatisfactory performance.

### **Respondent's Case**

9. The respondent avers that it, after confirmation engaged the Claimant on a one year renewable contract of employment which the Claimant signed. That the Claimant's duties were as per the contract of employment.
10. It is the respondent's case that the Claimant did not render any additional services and no payment was due.
11. It is further avered that the Claimant's performance was wanting and he had been warned of his poor performance but failed to improve and his employment was terminated.
12. That the Claimant was never promoted to the respondent's management list and his transfer to the branch in Westlands was procedural. That the Claimant exercised his duties negligently and had no respect for his supervisors and his termination was lawful.

### **Claimant's Evidence**

13. The Claimant adopted the written statement which is a replication of the statement of claim.
14. On cross-examination, the witness stated that he was interviewed for the position of electrician and was promoted to the Head of Department. The witness confirmed that he was issued with a notice to show cause on 16<sup>th</sup> May, 2014 but stated that he had not seen the letter. That the response dated 21<sup>st</sup> May, 2014 related to a complaint from a guest since the room was not habitable.
15. The Claimant confirmed that Management had discretion to transfer staff.
16. Although the Claimant stated that his last day of employment was 7<sup>th</sup> July, 2015, his NSSF contribution for the month was paid, a sum of Kshs.1,000/= as well as the salary for the month.



17. That he was not given a certificate of service.
18. On re-examination, the witness testified that the letter dated 16<sup>th</sup> May, 2016 was issued one (1) year to termination of employment. That he responded to the room issue in May, 2014 and no other complaint had been raised against him.

### **Respondent's Evidence**

19. RWI, Mr. Nicholas Ochieng adopted the written statement and was cross-examined.
20. The witness confirmed that the Claimant was employed as an electrician and later became the Maintenance Supervisor.
21. The witness admitted that he prepared the contract of employment dated 3<sup>rd</sup> March, 2013 that had no job description. That the Claimant was promoted for his exemplary performance.
22. RWI confirmed that the respondent did an audit of the rooms after complaints by customers and presented a report to the Claimant as the supervisor.
23. It was his testimony that the Claimant responded to the notice to show cause and the respondent opted to observe him without further action, but terminated his employment on 6<sup>th</sup> July, 2015 because new complaints were made.
24. RWI testified that the Claimant was found to be incompetent and was given a chance to improve but did not and was given a chance to defend himself on 4<sup>th</sup> July, 2015 in a sitting but the witness had no evidence of the minutes. He also confirmed that the termination letter made no reference to the meeting on 4<sup>th</sup> July, 2015.
25. On re-examination, the witness stated that the audit was carried out to ascertain the nature of the complaints. That he drafted the notice to show cause and received a response from the Claimant addressing the issues raised.
26. That the letter of termination gave reasons for termination of the Claimant's employment.
27. Finally, RWI testified that the Claimant was promoted after one (1) year of employment, was appraised twice in a year and accepted the new position.

### **Claimant's Submissions**

28. The Claimant identifies several issues for determination ranging from nature of contract of employment, violation of section 10(2)(c) of the *Employment Act*, 2007, whether termination of the Claimant's employment was unlawful and unfair, entitlement to the reliefs sought and costs.
29. As to the nature of the contract of employment, it is submitted that the initial contract from 16<sup>th</sup> November, 2012 was subject to a 3 months probationary period and the Claimant was confirmed thereafter to be on permanent terms.
30. Reliance is made on the provisions of sections 9 and 37 of the *Employment Act* to urge that the Claimant was a permanent employee of the respondent. The decision in Christopher *Baraza Wasike v Pemco Agencies Ltd* (2018) eKLR is relied upon to buttress the submission.
31. As regards violations of Section 10(2)(c) of the *Employment Act*, it is contended that the job description is a critical ingredient of the employment contract under the law. The decision in *Carolyn L. Musunye v Panari Hotel Ltd* (2017) eKLR is relied upon to reinforce the submission.



32. As to whether the Claimant's employment was unlawfully and unfairly terminated, the decision in *David Gichana Omuya v Mombasa Maize Millers Ltd* (2014) eKLR and section 43 of the Act are relied upon to urge that the termination was unfair in that the Claimant was required to perform tasks beyond his experience, there was no evidence of complaints against the Claimant, no evidence of performance appraisal, warning letter and the Claimant had been promoted for his good work.
33. It is further submitted that the respondent had no genuine reason to terminate the Claimant's employment.
34. On procedural fairness, reliance is made on the provisions of Section 41 of the *Employment Act* and the sentiments of Radido J. in *David Gichana Omuya V Mombasa Maize Millers Ltd* (Supra) to urge that termination of the Claimant's employment was unfair as the Claimant was not taken through a hearing as required by law.
35. As regards the reliefs sought, it is submitted that the Claimant is entitled to the 12 month's salary compensation for unlawful termination of employment and the respondent should bear the costs for refusal to settle the claim.

### **Respondent's Submission**

36. By the date the court retired to prepare this Judgement, the respondent had not filed its submissions.

### **Analysis and determination**

37. The issues for determination are;
  - i. Whether termination of the Claimant's employment was fair and lawful.
  - ii. Whether the Claimant is entitled to the reliefs sought.
38. As regards termination of employment, it is not in dispute that the Claimant was an employee of the respondent from 16<sup>th</sup> November, 2012 to 7<sup>th</sup> July, 2015 and rose from the position of electrician to Maintenance Supervisor. It is also not in dispute that his employment contract had a probationary period of 3 months after which he was confirmed.
39. The contract on record dated 3<sup>rd</sup> March, 2013 and signed by the Claimant and the respondent on even date shows that the Claimant was engaged under a one (1) year performance based renewable contract. The Claimant did not deny that he signed the contract on record.
40. The submission that the contract transitioned to permanent terms under the provisions of Section 37 of the *Employment Act* is of no movement because Section 37 deals exclusively with conversion of casual employees.
41. The provisions of the *Employment Act* are explicit on how an employer may lawfully and fairly terminate the employment contract between itself and an employee.
42. The court is in agreement with the sentiments of S. Radido J in *David Gichana Omuya vMombasa Maize Millers* (Supra) that;

“Prior to the *Employment Act*, 2007, an employer could dismiss an employee for a bad reason or no reason at all provided it was on notice. This has now changed . . .“



43. The provisions of the Act have made termination/dismissal from employment more onerous on the part of the employer. Sections 41, 43, 45 and 47(5) prescribe the heavy burden to be discharged by the employer in a termination of employment or dismissal.
- i. There must be a valid and fair reason for termination of employment.
  - ii. The reason, which the employer must prove, must relate to the conduct, performance compatibility of the employee or operational requirements of the employer.
  - iii. The termination of employment or dismissal must be conducted in accordance with fair procedure as prescribed by the provisions of Section 41 of the Act.
44. Cumulatively, the foregoing and other provisions of the *Employment Act* prescribe the minimum requirements on termination of employment. They prescribe the substantive and procedural attributes or essentials of a lawful and fair termination of employment or dismissal.
45. The twin requirements have been highlighted and elaborated upon in many decisions including, *Naima Khamisi v Oxford University Press (EA) Ltd* (2017) eKLR, *Walter Ogal Anuro v Teachers Service Commission*, *David Gichana Omuya V Mombasa Maize Millers Ltd* (Supra) and many others.
46. These decisions emphasize that for a termination of employment or dismissal to be fair, it must be substantively justifiable and must have been conducted in accordance with fair procedure. These are the minimum prescriptions. I will now proceed to apply the provisions and propositions of law to the facts of the instant case.

### **Substantive justification**

47. The termination letter dated 6<sup>th</sup> July, 2015 states that the reason for the Claimant's termination from employment was;
- “This is due to horrible condition/state branch was found to be under your supervision, your slowness to respond to urgent issues as well as lack of supervisory capabilities.”
48. It is the Claimant's testimony that he was promoted to the list of management of the respondent. RWI confirmed that he was the Maintenance Supervisor and performed well. However, the Claimant admitted on cross-examination that his performance was queried when an audit of the rooms was done and a customer had complained about the condition of a particular room.
49. In addition, the respondent issued a notice to show cause dated 16<sup>th</sup> May, 2014 which the Claimant denied receipt yet his hand written letter dated 21<sup>st</sup> May, 2015 responds to the issues raised by the notice to show cause.
50. Significantly, the alleged complaint by a customer or guest was never produced by the Claimant to demonstrate what he was responding to in the same month and week the notice to show cause was issued. A mere coincidence was highly unlikely.
51. Moreover, RWI confirmed that he issued the notice to show cause and received a response from the Claimant which addressed the issues raised and no further action was taken against the claimant. The Claimant's statement makes no reference to the complaint by the guest or the claimant's response.
52. Finally, the Claimant accepted the promotion to the position of Maintenance Supervisor and as explained by RWI in re-examination, he neither indicated his inability to discharge his functions as the supervisor nor decline the position.



53. Section 43(2) of the *Employment Act* provide that;

The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.

54. Contrary to the Claimant's submissions that there was no evidence of performance, documents on record show that an audit of the rooms found that some had issues that had not been attended to by the Claimant as the supervisor and as early as 2014, a year earlier the respondent had issued a notice to show cause.

55. For the above stated reasons, the court is satisfied that the respondent has on a balance of probability established that it had a valid and fair reason to terminate the Claimant's employment on 6<sup>th</sup> July, 2015 as ordained by Section 45 of the *Employment Act*.

### **Procedural fairness**

56. Section 41 of the *Employment Act* prescribes the essential elements of procedural fairness. The procedural steps prescribed by Section 41 are mandatory as underscored by the Court of Appeal in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR.

57. The specific steps to be complied with by the employer were itemised by S. Radido J. in *David Gichana Omuya vMombasa Maize Millers Ltd* (Supra) and by the court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR among other decisions.

58. The essential elements are notification of the allegations or charges the employee is being accused of as the reason(s) for which the employer is contemplating termination of employment; entitlement of the employee to be accompanied by a fellow employee of his/her choice when the charges or allegations are formally made.

Right to prepare and make representations at the hearing. The fellow employee may also make representations.

Consideration of the representations by the disciplinary panel in its deliberations and decision making.

59. In the instant case other than the notice to show cause dated 16<sup>th</sup> May, 2014, no other notice was issued to the claimant to inform him about the new or persistent complaints by guests or the outcome of the alleged audit. Unlike in the earlier case in 2014, the Claimant was not given the opportunity to rebut the allegations made against him. This is contrary to the provisions of Section 41 of the *Employment Act*.

60. Puzzlingly, RWI testified on cross-examination that the claimant was taken through a disciplinary process and given an opportunity to defend himself. That there was a sitting on 4<sup>th</sup> July, 2015 yet he had no scintilla evidence of the meeting. In addition, the respondent adduced no evidence that it invited the Claimant to the alleged meeting and that he was informed of the right to be accompanied by a fellow employee of his choice.

61. In his examination in chief, the claimant was categorical that he was not taken through a disciplinary hearing. With no evidence of an invitation of the claimant to the alleged meeting on 4<sup>th</sup> July, 2015 or the deliberations of the meeting, the alleged meeting remains an unsubstantiated allegation.

“The employer is also under an obligation to hear the employee before dismissing him. An employee is entitled to be heard before dismissal because the dismissal will adversely affect his



rights and source of livelihood. The ordinary employee now has security of tenure . . .” (See Stephen Radido J in *David Gichana Omuya v Mombasa Maize Millers Ltd* (Supra).

62. For the foregoing reasons, it is the finding of the court that the respondent has on a balance of probability failed to demonstrate that it complied with the mandatory provisions of Section 41 of the *Employment Act*. The non-compliance with the provisions rendered termination of the Claimant’s employment procedurally flawed and thus unfair.

### **Reliefs**

63. Having found that termination of the claimant’s employment was unfair, the court proceeds as follows:

- (a) Having found that termination of the Claimant’s employment was unfair and unlawful, a declaration to that effect is hereby issued.
- (b) 12 months for unfair termination.

64. Having found that termination of the Claimant’s employment was unfair for want of procedural fairness, the primary remedy is compensation under Section 49(1) (c) of the *Employment Act* which is capped at the equivalent of 12 month’s salary. This remedy is discretionary and in determining the level of compensation, the court is enjoined to take into account the parameters set out in section 49(4) of the Act.

65. In this case, the court has considered the following;

- i. The claimant was an employee of the respondent for about 2 years and 7 months, a relatively short time.
- ii. The Claimant did not appeal the decision to terminate his employment.
- iii. The Claimant had one notice to show cause dated 16<sup>th</sup> May, 2014 and responded to the allegations made against him.

66. In light of the foregoing, the court is satisfied that the equivalent of 3 month’s salary is fair.

(c) Certificate of service

67. The Claimant is entitled to a certificate of service by dint of Section 51(1) of the *Employment Act*, 2007.

68. In conclusion, Judgement is entered for the Claimant against the respondent in the following terms;

- i. Equivalent of 3 months alary.
- ii. Costs of this suit.
- iii. Interests at Court rates from the date hereof till payment in full.
- iv. Certificate of service

69. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF JULY 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

