



**Ngatia v Airmac Limited (Cause 789 of 2018)
[2022] KEELRC 1259 (KLR) (18 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1259 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 789 OF 2018**

JK GAKERI, J

JULY 18, 2022

BETWEEN

SAMUEL MWANGI NGATIA CLAIMANT

AND

AIRMAC LIMITED RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a statement of claim dated 22nd May 2018 and filed on 23rd May 2018 alleging unfair dismissal from employment and entitlement to terminal dues.
2. The Claimant alleges that on 9th October 2017, the respondent employed him as the Pastry Chef in the Kitchen Department at a gross salary of Kshs.90,000/= per month.
3. The contract had a three (3) months probationary period which he served and was confirmed as evidenced by letter dated 25th November 2017.
4. It is the Claimants case that he served the respondent with zeal and diligence.
5. The Claimant avers that on 19th January 2018, he was summoned by the Human Resource Manager, one Nkuraiya to a training room next to the Manager's office and asked to explain what had transpired the previous day. That the Manager informed him that one, Miriam, an employee had complained that the Claimant had touched her inappropriately and it was not the first complaint made against him. That the claimant denied the allegations.
6. The Claimant avers that after the discussion, the Manager went to his office and issued the Claimant a suspension letter, and was to report back on 22nd January 2018 at 11.00 am
7. It is averred that on 22nd January 2018, the claimant reported to the office and was notified of the disciplinary hearing for which he was not prepared as he had not been given prior notice by the



respondent. That the hearing proceeded notwithstanding his protestation that he had no workmate or counsel.

8. The Claimant avers that the following morning, the Human Resource Manager summoned him to his office and informed him that even though no evidence was led at the hearing, the company had resolved to terminate his employment and the Manager gave him the letter of termination of employment.
9. It is further alleged that no warning letter was issued and the claimant was not notified of the disciplinary hearing. It is his case that he was not given an opportunity to be heard.

The Claimant Prays for

- i. A declaration that the respondent's action in dismissing the Claimant from employment was unlawful and unfair.
- ii. The sum of Kshs.1,080,000/= comprising 12 month's salary @ Kshs.90,000/= per month as compensation.
- iii. Certificate of service.
- iv. Costs of this suit.

Respondent's Case

10. The Respondent filed its statement of defence on 17th August 2018 admitting that the Claimant was its employee, having been employed on 9th October 2017 as a Pastry Chef at a gross salary of Kshs.90,000/= per month.
11. That the Claimant's employment was confirmed on 25th November 2017 but denies that he was a diligent employee.
12. It is averred that an employee by the name Miriam Njoki complained of sexual harassment by the Claimant on 18th January 2018 and the Claimant was summoned on 19th January 2018 to explain his version of the alleged event. That despite repeated warning to desist on 18th January 2018, the Claimant pinched the upper thighs of the Miriam three times. It is alleged that the claimant often used obscene language and sexually suggestive acts towards the employee.
13. That the Claimant had initially admitted having touched the Claimant but later changed his story and denied the allegations.
14. That a notice to show cause was issued on 19th January 2018 which notified the Claimant the date of the disciplinary hearing on 22nd January 2018 at 11.00 a.m, three days before the hearing and he was aware of the allegations against him.
15. The respondent avers that the Claimant was suspended on 19th January 2018.
16. That the Claimant had two staff members as witnesses.
17. That during the hearing, the Claimant did not respond to the allegations, but dwelt on extraneous issues.
18. It is the respondent's case that the Human Resource Manager never indicated to the Claimant that no evidence had been adduced against him at the hearing.
19. That the disciplinary panel found the evidence of sexual harassment credible and the termination of employment was fair in the circumstances.



20. Finally, the respondent avers that it paid claimant Kshs.120,861/= which he accepted unconditionally.
21. On 24th November 2021, the matter was mentioned before the Mediation Registry to confirm its status, the respondent did not attend the virtual mention and a mention was slated for 6th December 2021 on which date the respondent did not attend. A mention slated for 18th January 2021 does not appear to have taken place.
22. On 9th February 2022, only the Claimant was present and reported to court that the respondent had withdrawn from the Mediation Process by which date the Mediator had already filed a report dated 27th January 2022 filed on 8th February 2022 indicating that the parties had failed to reach a settlement.
23. At a mention before the Deputy Registrar on 8th March 2022, the respondent did not attend. The Deputy Registrar gave a hearing date.
24. On 25th April 2022, the hearing date, the respondent did not attend notwithstanding service of hearing notice and acceptance by the respondent's counsel.
25. Hearing proceeded from 13.18 pm.

Claimant's Evidence

26. The Claimant adopted the written statement and testified that he signed the contract of employment on 9th October 2017 and employment was terminated on 22nd January 2018.
27. The witness testified that he was not given the reason for termination of employment and the termination was unfair.
28. Owing to the absence of the respondent, the claimant was not cross-examined and the respondent led no evidence.
29. During the mention to confirm the filing of submissions, the respondent was represented by Mr. Otieno who reported receipt of the claimant's submissions but prayed for 14 days to file and serve its submissions.
30. Judgement was slated for 13th July 2022.
31. By 9th June 2022 when the court retired to write this Judgement, the respondent had not filed submissions.
32. Worthy of note, the claimant's list of documents include copies of the contract of employment dated 9th October 2018, confirmation letter, payslips for October to December 2017, notice to show cause, reply to the notice to show cause, suspension letter, statement on the hearing held on 22nd January 2022, statement of Jackson K, a witness during the hearing, letter of termination, demand letter and certificate of posting dated 16th April 2018.

Claimant's Submissions

33. The Claimant identifies two issues for determination, namely;
 - (i) Whether the Claimant's dismissal from employment was lawful and fair.
 - (ii) Whether the Claimant is entitled to the remedies sought.
34. As to whether the termination of employment was fair and lawful, the Claimant addresses the substantive and procedural aspects of the dismissal.



35. As regards substantive fairness, reliance is made on the *Employment Act* to underscore the essence of section 43 of the *Employment Act*, 2007 regarding the duty of the employer to establish the reason(s) for the dismissal.
36. It is urged that after the disciplinary hearing, the Human Resource Manager told the Claimant that no evidence had been found against him.
37. That as a consequence, the respondent had no valid reason to terminate the Claimant's employment.
38. On procedural fairness, reliance is made on the provisions of section 41 of the *Employment Act* to urge that the Claimant was not given sufficient time to prepare his defence and did not have a fellow employee at the hearing nor was he notified of the right to be accompanied by a fellow employee.
39. The decision in *Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture & Technology* (2014) eKLR is cited to buttress the submission that the Claimant was entitled to have the charges clearly stated and be furnished with the documents in the possession of the employer to prepare his defence.
40. As regard the reliefs sought, it is submitted that the Claimant is entitled to 12 month's salary compensation under section 49 of the *Employment Act* and costs of the suit.

Analysis and determination

41. The issues for determination are;
 - i. Whether termination of the Claimant's employment was fair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
42. As to whether the termination of employment was fair, the starting point are the provisions of the *Employment Act* on termination, and more specifically sections 41, 43, 45, 47 (5) of the Act which prescribe the procedural steps to be complied with by the employer, duty of the employer to prove the reason(s) for termination, that the reason(s) was valid and fair and justify the ground(s) for termination respectively.
43. A summary of the requirements of these provisions was given by the Court of Appeal in *Pius Machafu Osindu v Lavington Security Guards Ltd* (2017) eKLR.
44. In a nutshell, these provisions prescribe the essentials of a fair and lawful dismissal or termination of employment. It must be substantively justifiable and procedurally fair. See *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR.

Reasons for Termination

45. In the instant case, the Claimant is accused of having touched a female colleague inappropriately on 18th January 2018 and had previously made obscene and sexually related remarks towards the same employee. The statement attached to the Claimants bundle of documents set out the allegations the Claimant was facing.
46. In his undated response to the notice to show cause which he denies in his testimony in court on 25th April 2022, the Claimant does not categorically deny the allegations against him but address other issues such as the challenges the boy child is facing vis-a-vis the favoured girl child and having stopped the employee from taking cereals and that she was disrespectful.



47. Although the claimant states that the allegations were false, he makes no reference to the specific incident on 18th January 2018.
48. There is no evidence of enmity between the two to suggest that the employee was on a revenge mission and the complaint was raised on the day it allegedly happened.
49. The statement by one Jackson is dated on 22nd January 2018. It is unsigned and is thus unauthenticated and unreliable.
50. Relatedly, the statement by Lillian is dated 24th January 2018, two days after the disciplinary hearing and was thus not useful as well for purposes of the disciplinary hearing.
51. Although the claimant alleges that he talked to the Human Resource Manager after the hearing, the alleged conversation is not supported by any evidence. The Claimant led no evidence of concurrence of the Human Resource Manager.
52. From the evidence on record, the court is satisfied that the Claimant has not on a balance of probability exculpated himself from the allegations made against him by one Miriam Njoki who repeated the same to the Human Resource Manager on 18th January 2018.

Procedure of Termination

53. As regards the procedure employed by the respondent, the Claimant urges that he was not afforded sufficient time to prepare his defence as he was unaware that the hearing would take place on 22nd January 2018.
54. This is not entirely correct in that the Show Cause letter dated 19th January 2018 stated that;

“In view of the above, you are required to Show Cause in writing by Monday 22nd January 2018 at 11.00 am. Why disciplinary action should not be taken against you. The hearing meeting will be held on the same day.”
55. Undeniably, the Claimant was aware that the disciplinary hearing would take place on 22nd January 2022, though the timing was not specified. The allegation that he was unaware of the hearing date is untrue.
56. Owing to the absence of minutes, it is unclear when the hearing commenced and the form the proceedings took.
57. A document styled ‘statement on the hearing held on 22nd January 2018’ signed by three (3) persons including the Claimant and another unentitled page dated 22nd January 2018 purportedly communicating the decision of the panel cannot pass muster as evidence of the proceedings or the decision taken.
58. In a nutshell, the respondent has not filed minutes of the alleged disciplinary hearing. It is unclear as to what the agenda was, participants and what they stated and the decision made of the meeting and how it was executed to conclusion.
59. The court is in agreement with the Claimant’s submissions that the purported hearing was not fair. The Claimant was not informed of his right to be accompanied by a fellow employee to the hearing nor the right of appeal against the decision.



60. In *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR, the Court of Appeal stated as follows;
- “Four elements must thus be discernible for the procedure to pass muster:-
- i. An explanation of the grounds after 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 representation made by the employee and the person chosen by the employee.”
61. The Court is guided by this sentiments.
62. In *Pius Machafu Isindu v Lavington Security Guards Ltd (Supra)* the Court of Appeal stated that;
- “... A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
63. While the first two elements were satisfied by the respondent, the last two were not.
64. The notice to show cause dated 19th January 2018 is reticent on the Claimant’s right to have a fellow employee during the explanation of the grounds on which the respondent was considering termination of employment.
65. Similarly, there is no evidence on record that the respondent heard and considered the representations by the Claimant.
66. Although the Claimant responded to the notice to show cause, the propriety of the alleged hearing on 22nd January 2018 is contested by the Claimant and the respondent tendered no evidence in response. In addition, the duration between the response to the notice to show cause and the alleged disciplinary hearing was too short for the Claimant to prepare adequately.
67. Finally, the Claimant does not appear to have been given the statement made by the complainant, one Miriam Njoki dated 19th January 2018.
68. The Court is in agreement with the holding in *Rebecca Ann Maina & 2 others V Jomo Kenyatta University College of Agriculture & Technology (Supra)* that;
- “However, in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the position of the employer which would assist them in preparing their defence.”
69. For the above reasons, the Court is satisfied and finds that the respondent has failed to demonstrate that it complied with the precepts of procedural fairness set out in section 41 of the *Employment Act*.
70. It is the further finding of the Court that termination of the Claimant’s employment on 22nd January 2018 was procedurally unfair.



Reliefs

- (a) A declaration that the respondent's action in dismissing the claimant from employment was unlawful and unfair.
71. Having found that termination of the Claimant's employment by the respondent was unfair and unlawful, a declaration to that effect is hereby issued.
- (b) 12 months salary compensation Kshs.1,080,000/=
72. Having found that the termination of the Claimant's employment by the respondent was unfair, the Claimant is entitled to the relief provided by section 49(1) (c) of the Employment Act.
73. Taking into account the fact that the Claimant worked for the respondent for a fairly short duration of 3 months and 13 days, has not demonstrated that he wished to continue by appealing against the decision against the directors of the company and was to blame for the termination, the court is satisfied that the equivalent of one (1) month's gross salary is fair.
- (c) Certificate of service
75. The claimant is entitled to the certificate of service by dint of section 51 of the Employment Act.
74. In the final analysis, Judgement is entered for the Claimant against the respondent as follows;
- a. Equivalent of one (1) month salary compensation, Kshs.90,000/=
- b. Certificate of service.
- c. Costs of this suit.
- d. Interest at Court rates from the date hereof till payment in full.
76. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH 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 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

