



REPUBLIC OF KENYA



**KENYA LAW**  
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**Joha v Salwa Kenya Limited (Cause 48 of 2020)  
[2022] KEELRC 1351 (KLR) (15 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1351 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 48 OF 2020**

**B ONGAYA, J  
JULY 15, 2022**

**BETWEEN**

**SALIM HASSAN JOHA ..... CLAIMANT**

**AND**

**SALWA KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the statement of claim on 27.08.2020 through Abdiwahid & Associates. The claimant prayed for judgment against the respondent for:
  - a. Unpaid salary for April 2020 Kshs. 100, 000.00.
  - b. Unpaid salary for notice period waived Kshs.100, 000.00.
  - c. 12 Months' Salary as damages for unlawful termination  $12 \times 100,000 =$  Kshs. 1, 200, 000.00.
  - d. Unpaid leave for one year Kshs. 100, 000.00.
  - e. Interest until full payment.
  - f. Costs of the suit.
2. The respondent filed the reply to the memorandum of claim on 17.09.2020 through Abdiaziz & Company Advocates. The respondent prayed that the claim be dismissed with costs.
3. At the hearing on 30.07.2021 by consent, partial judgment was entered for the claimant against the respondent for:
  1. Payment of salary up to 15.04.2020 Kshs. 50, 000.00.
  2. Pay in lieu of the notice Kshs. 100, 000.00.



3. Pay in lieu of annual leave Kshs. 100, 000.00.
  4. The Kshs. 250, 000.00 above be paid less PAYE, NHIF, and NSSF for April 2020.
  5. Certificate of service to issue.
  6. Issue of pay for 15 days in April 2020, 12-months compensation, interest, and costs to go on for full hearing and determination.
4. The 1<sup>st</sup> issue for determination is whether the termination was unfair. There is no dispute that the respondent employed the claimant as a Human Resource Manager and Administration Assistance. It was by a letter of employment signed on 10.05.2019 and upon three months of probationary service. The gross monthly salary was Kshs.100, 000.00. He reported to the Managing Director Ahmed Maalim also the respondent's witness herein (RW). The appointment took effect not later than 07.05.2019. The claimant worked effective 07.05.2019.
  5. There is no dispute that the claimant received the letter on suspension from work dated 15.04.2020. The letter stated that the claimant was aware that the respondent had missed production targets for the last six months and the respondent had investigated the matter and found that the same had largely been caused by lack of team work, disharmony, lack of communication and unending internal staff wrangles within the department. The letter then concluded, "In lieu of the above, the management has resolved to proceed you on 14-days unpaid leave from date of this letter to carry out further investigations." The letter was signed by the managing director.
  6. The claimant's testimony and case is that the suspension or leave ended on 29.04.2020 and he reported on duty on 30.04.2020 but was locked out at the gate. The security guard at the gate one Rashid advised him that the Managing Director (RW) had instructed that the claimant is locked out. The claimant's case and evidence was that he then went away and instructed his Advocate to issue the demand letter dated 21.05. 2022. The respondent's Advocates replied by the letter dated 28.05.2020 stating that the claimant had never been dismissed as there was no letter of dismissal and further, the demand letter amounted to a "jump the gun" letter.
  7. Thereafter, the claimant's further case and testimony was that, the respondent reacted to the demand letter by issuing a letter dated 30.06.2020 inviting him to a disciplinary hearing on 06.07.2020 and to cover up for the unfair termination which had already taken effect on 30.04.2020. The invitation letter alleged gross misconduct, leaking management information, poor work ethics, poor performance, and due negligence causing the company loss to lose money and resources. The letter was signed by Desmond Tutu for Human Resource.
  8. RW for the respondent admitted that the claimant had been suspended by the letter dated 15.04.2020 and the suspension extended by the respondent's letter dated 29.04.2020 for 30-days but which the claimant denied ever receiving. RW testified that due to the COVID-19 pandemic the respondent closed its offices at Kikambala and on 29.04.2020 the claimant had found the offices closed when he reported after the end of the suspension period. Further the claimant was informed to get in touch but he failed to do so. He also refused to attend the disciplinary hearing on 30.06.2020 and the respondent decided to dismiss him. RW testified that the claimant had not received the letter extending the suspension dated 29.04.2020. He further confirmed that the claimant's demand letter was on 21.05.2020 and the invitation to disciplinary hearing had been long thereafter on 30.06.2020. RW confirmed the claimant had not been served a letter to show cause. Further, on 06.07.2020 disciplinary deliberations had allegedly taken place but the claimant had been absent and a decision to dismiss was made. RW testified production had reduced but he had no evidence to show the same. RW testified that



he had no evidence of the wrangles alleged against the claimant. He further testified that the claimant left work on his own.

9. The Court has considered the material on record, First the Court finds that the procedure leading to termination was unfair. The parties had not agreed on suspension without pay and the procedure as imposed was unfair ab initio. If the respondent had valid claims of misconduct or poor performance, the mandatory procedure as per submissions for the claimant was a notice and a hearing as per section 41 of the *Employment Act*, 2007. The Court further finds that the allegations purportedly levelled were generalised and lacking in particulars. It was an unfair procedure.
10. Section 43 of the Act required the respondent to show the reasons for termination existed as at termination and that they were valid. Section 47 (5) of the Act also required the respondent to show the grounds justifying the termination. RW did not by his evidence establish any of the generalised ground of misconduct or poor performance alleged in the suspension letter and then, in the letter of invitation to the disciplinary hearing. The Court finds that it cannot be said that the respondent has shown that there existed reasons for termination that related to the claimant's conduct, capacity or compatibility as well as relating to the respondent's operational requirements per section 45 of the Act. The submissions made for the claimant are upheld. While the claimant may have received the letter of 30.06.2020 for a disciplinary hearing on 06.07.2020, the Court finds that it was a belated attempt by the respondent to purge the unfair termination which had already accrued.
11. The Court therefore returns that the termination of the contract of service was unfair. The claimant was entitled to consider himself terminated on 30.04.2020 when he reported at work and he was locked out.
12. The 2<sup>nd</sup> issue for determination is on remedies. The Court has considered the factors in section 49 of the *Employment Act* on award of damages. The Claimant had served for about a year. He desired to continue in employment. The respondent at the hearing consented to pay the claimed special damages though, belatedly so. There is no evidence the claimant had contributed to his separation with the respondent. The Court has considered the mitigating factor that at the material time COVID -19 was at peak and which may have chained the otherwise smooth communication between the parties at the time of disciplinary hearing. The respondent nevertheless invented an unlawful termination procedure initiated by way of unpaid suspension. To balance justice for the parties the claimant is awarded Kshs. 300, 000.00 being 3 months' salaries in compensation for unfair termination. His termination was on 30.04.2020. It has been found to have been unfair. The suspension without pay had no contractual basis. He is therefore awarded Kshs. 50, 000.00 being outstanding payment for April 2020 and in view of the consent order on record. The claimant has succeeded in his claims and in absence of any other circumstance but in view of the partial consent judgment he is awarded 75% costs of the suit.
13. In conclusion, judgment is hereby entered for the claimant against the respondent for:
  1. The respondent to pay the claimant a sum of Kshs. 350, 000.00 (less PAYE) by 01.09.2022 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
  2. The respondent to pay 75% claimant's costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 15<sup>TH</sup> JULY, 2022.**

**BYRAM ONGAYA**

**JUDGE**

