



**Thuo v Mobimex Tours and Safaris (K) Limited (Cause 1755 of 2017)  
[2022] KEELRC 3803 (KLR) (15 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3803 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1755 OF 2017**

**SC RUTTO, J**

**JULY 15, 2022**

**BETWEEN**

**DANIEL KIRITE THUO ..... CLAIMANT**

**AND**

**MOBIMEX TOURS AND SAFARIS (K) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant avers that he was employed by the respondent as a store keeper and that he served diligently to the satisfaction of his employer until 14<sup>th</sup> October, 2014 when his services were terminated. The claimant has termed his termination by the respondent as unlawful and against the principles of natural justice. As a result, he seeks against the respondent the sum of Kshs 1,359,860/= being salary in lieu of notice, unpaid leave days, untaken public holidays, unpaid overtime, compensatory damages and unpaid house allowance.
2. The claim was defended with the respondent disputing that the claimant served diligently and to its satisfaction. It averred that the claimant as the sole custodian of the company stores, was unable to explain the loss of items from the said stores. That the actions of the claimant therefore amounted to gross misconduct involving poor performance and which resulted in the respondent suffering financial loss. The respondent further averred that the claimant's termination was therefore based on sound reasons. Consequently, the respondent asked the Court to dismiss the claim with costs as the claimant's termination was lawful.
3. The matter proceeded for trial on 17<sup>th</sup> March, 2022, with each side presenting oral evidence.

**Claimant's case**

4. The claimant testified in support of his case and at the start of the hearing, sought to adopt his witness statement together with the bundle of documents which were filed with the claim, as his evidence in chief. The documents were also produced as exhibits before Court.



5. The claimant informed Court that on 14<sup>th</sup> October, 2014, while he was at work the respondent's Manager by the name Mr. Njuguna called him and told him that they will part ways. That the said Mr. Njuguna then asked him to go and wait at the parking yard. That after sometime, the company's accountant approached him and asked him to sign a payment voucher for the value of Kshs 5,000/= . That thereafter, he was then given Kshs 5,000/= and informed that the same was part of his salary. It was his further testimony that the balance of his dues was subsequently sent to him in bits through MPesa. It was the claimant's further testimony that he did not commit any wrong and that there was no theft at the respondent company. That further, he was never reported to any police station on account of the alleged theft. The claimant further stated that he was not taken through any disciplinary hearing prior to being terminated. In conclusion, he asked the Court to allow his claim as prayed.

### **Respondent's case**

6. On its part, the respondent called Mr. George Njoroge Kamau, who identified himself as its Operations Manager. He testified as RW1 and at the outset, also sought to rely on his witness statement and bundle of documents filed on behalf of the respondent. He asked the Court to adopt the same as his evidence in chief. The documents were also admitted as the respondent's exhibits before Court.
7. It is the respondent's case through RW1, that during the time the claimant was a store keeper in its company, there were several incidences of theft and loss of items in its stores. That despite several verbal warnings, the claimant continued with his poor performance and the loss of items in the stores continued. That as such, he was summarily dismissed on 14<sup>th</sup> October, 2014 upon being given an opportunity to defend himself verbally. That contrary to the claimant's averments, he received his monthly wage payments and that he never raised any query or complaint with the respondent or the labour office on issues of house allowance, untaken leave days, unpaid public holidays or overtime. RW1 summed up his testimony by stating that there were good grounds for the claimant's summary dismissal hence he is not entitled to any compensation.

### **Submissions**

8. It was submitted on behalf of the claimant that the allegations against him were not substantiated. That the same were verbal and false since the respondent was not able to table any evidence to prove poor performance. The case of *Jane Samba Mukala vs Ol Tukai Lodge Limited* (2010), LLR 255 (ICK) was cited in support of this argument. It was the claimant's further submission that there were no valid reasons to terminate his employment as required under section 45 of the *Employment Act*. In further submission, the claimant stated that the respondent undermined due process under section 41 of the *Employment Act*. To this end, reliance was placed on the case of *Donlad Odeke vs Fidelity Security Ltd*, Cause No. 1998 of 2011.
9. On the other hand, the respondent submitted that there were valid and fair reasons to warrant the claimant's summary dismissal as there were transgressions on his part within the meaning and intent of section 44(4) of the *Employment Act*. That further, it followed fair procedure as the claimant was informed and was well aware of the charges he was facing. The respondent in further submission stated that there is no requirement for an oral hearing as determined by the Court of Appeal in the case of *Kenya Revenue Authority vs Menginya Salim Murgani*, [2010] eKLR.

### **Analysis and determination**

10. Upon considering the pleadings, the evidentiary material placed before me and the rival submissions, the issues falling for the Court's determination can be condensed as follows: -



- a. Whether the claimant's termination was unfair and unlawful?
- b. Is the claimant entitled to the reliefs sought?

### **Whether the claimant's termination was unfair and unlawful?**

11. The claimant has alleged that his termination was unfair as he had not committed any wrongful act to warrant the same. On the other hand, the respondent states that there were reasons for the claimant's dismissal and that the same was fair and procedural.
12. In order to prove fair termination under the *Employment Act* (Act), an employer must prove that there was substantive justification to warrant the termination of an employee. This is not enough. The employer also bears the evidentiary burden of proving that the termination was undertaken in accordance with fair procedure.
13. In a nut shell, the employer must prove that there was substantive justification and procedural fairness. Subsequently, I will proceed to apply the two requirements to the instant case.

#### **i. Substantive justification**

14. Substantive justification basically entails proving the reason for which an employee was terminated. In this regard, Section 43(1), of the Act requires an employer to prove reasons for termination, and in absence thereof, such termination is deemed to be unfair. In addition, Section 45 (2) of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and is related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.
15. It also bears to note that the burden of proof lies with the employer. This position was amplified by the Court of Appeal in the case of *Chairman Board of Directors (National Water Conservation and Pipeline Corporation) v Meshack M. Saboke & 2 others*, Nairobi Civil Appeal No. 241 of 2015, as follows: -

“In light of the above provision, termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair. Section 43 of the *Employment Act* deals with proof of reasons for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of section 45.”
16. In the case at hand, it is worth noting that the claimant was not issued with a letter of termination or such other document to signify the end of his employment with the respondent. Nonetheless, the respondent has stated in its response to the claim that there were incidences of theft at its stores at the time the claimant was a store keeper. That being the sole custodian of the stores, he was unable to explain the loss of items from the stores. The respondent further stated that the claimant failed and/or neglected and/or refused to keep proper records of the equipment and inventory at its stores hence leading to other incidents of theft which he was unable to explain.
17. It is therefore evident that the claimant was let go by his employer on grounds of negligence and improper performance of duty.



18. Pursuant to section 43 (1) of the Act, an employer is enjoined to prove the reasons for which it terminated an employee's employment. Such reasons ought to be fair and valid. It therefore goes without saying that an employer can only achieve this by presenting relevant evidence before Court.
19. In the instant case, the respondent despite stating the reasons for which it dismissed the claimant, failed to back up its assertions with evidence in whatever form or manner. As it is, there was no evidentiary material that was presented before Court to justify the reasons that were proffered as being behind the claimant's summary dismissal.
20. I must say that without any evidence from the respondent's end to prove the reasons for the claimant's dismissal, it failed to discharge its evidentiary burden as required by law.
21. Coupled with the foregoing, there is no evidence that the claimant was issued with the reasons for his termination at the time of his dismissal. I say so because there is no letter of termination on record or such other document addressed to the claimant signifying as much. This leaves room for speculation as to the real reason for the claimant's termination. Indeed, at the end of the day, it is hard to tell the real reason behind his dismissal.
22. The long and the short of it is that the respondent did not prove any justifiable cause for terminating the claimant's employment.
23. This only leads me to conclude that the claimant's dismissal was substantively unfair contrary to the requirements of sections 43(1) and 45(2) (a) and (b) of the Act.

## **ii. Procedural fairness**

24. Over and above proving substantive fairness, an employer is required under Section 45(2) (c) of the Act to comply with fair procedure. In this respect, section 41(1) of the Act specifies the details of fair procedure as entailing notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a union representative of own choice.
25. This position was articulated by the Court of Appeal in the case of *Kenfreight (E.A.) Limited vs Benson K.Nguti* [2016] eKLR as follows:-
 

“Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a 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.” Underlined for emphasis
26. The respondent stated in its response and through the testimony of RW1, that it issued the claimant with verbal warnings each time it had issues with his performance or conduct. That as such, he was given a fair hearing.
27. These assertions by the respondent, notwithstanding, it did not present any evidence to support the same. There were no minutes or record of such meetings where the claimant was allegedly called to explain himself and to respond to the accusations of non performance or negligence of duty.
28. As it is, there is no other way an employer can demonstrate compliance with the provisions of Section 41 of the Act without documentary evidence to that effect.



29. In this case, the claimant's assertions were unsupported and the same remained bare.
30. On this issue, I wish to underscore the determination by the Court of Appeal in the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, where the learned Judges held that the provisions of section 41 of the Act, are mandatory. The respondent was therefore bound to comply with the same and anything short of that, rendered the dismissal unlawful.
31. From the record before me and by all indications, there is no evidence that the respondent afforded the claimant an opportunity to be heard and to this end, it went against the provisions of section 41 hence the resultant dismissal was not lawful.
32. The net effect of the foregoing, is that there was no substantive justification to warrant the claimant's termination and there is no evidence that he was accorded procedural fairness. This fell short of the requirements stipulated under section 45 of the Act hence I find that his termination was unfair and unlawful.

### Reliefs

33. As I have found that the claimant's termination was unfair, I will award him compensatory damages equivalent to eight (8) months of his salary. This award has taken into account the length of the employment relationship and the fact that the respondent did not prove that there was substantive justification to terminate the claimant's employment and that in so doing, it complied with the procedural requirements.
34. The claimant is also awarded one (1) month's salary in lieu of notice, as the Court has found that his dismissal was unfair and unlawful.
35. As regard reliefs in respect of unpaid leave days, public holidays, rest days and overtime worked, the Court declines to award the same as they have not been proved. On this issue, I wish to draw guidance from the determination of the Court of Appeal in *Patrick Lumumba Kimuyu v Prime Fuels (K) Limited* [2018] eKLR, where the learned Judges cited with approval the case of *Rogoli Ole Manadiegi v General Cargo Services Limited* (2016) eKLR, as follows:-

“Addressing a similar issue this Court in its decision in *Rogoli Ole Manadiegi v General Cargo Services Limited* (2016) eKLR expressed as follows;

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”

The Court disallowed that claim. This case is on all fours with the above case and we reiterate the above finding. The finding by the trial court that the appellant had failed to prove his claim with regard to compensation for public holidays and Sundays worked is without fault. That ground of appeal must therefore fail.”

36. As regards house allowance, the claimant is seeking to recover the sum of Kshs 325,800/= for the 10 years he worked for the respondent. In rejoinder, the respondent has stated that the claimant's salary



was inclusive of house allowance. It is notable that the claimant's pay slip was not presented before the Court to evidence the breakdown of the salary paid to him.

37. Be that as it may, I am inclined to agree with the respondent that the claim for house allowance is time barred by dint of Section 90 of the *Employment Act*. This is on account of the fact that the claim is in the nature of a continuing injury hence ought to have been brought within twelve (12) months after the cessation thereof. As such, time started running from 14<sup>th</sup> October, 2014 when the claimant was terminated and it stopped on 14<sup>th</sup> October, 2015 whereas the claim was filed on 4<sup>th</sup> September, 2017. Needless to say, the claim was statute barred by the time it was filed.

### Orders

38. In the final analysis, I enter judgment in favour of the claimant against the respondent and he is awarded: -
- a. Compensatory damages equivalent to eight (8) months of his salary being Kshs 144,800.00.
  - b. One (1) month's salary in lieu of notice, being the sum of Kshs 18,100.00.
  - c. The total award is Kshs 162,900.00.
  - d. Interest on the amount in (c) at Court rates from the date of Judgment until payment in full.
  - e. The respondent shall also bear the costs of this claim.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JULY, 2022.**

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**STELLA RUTTO**

**JUDGE**

Appearance:

For the Claimant Ms. Omamo

For the Respondent Mr. Njoroge

Court Assistant Barille Sora

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 had 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.

**STELLA RUTTO**

**JUDGE**

