



**Wanyonyi v Haveer Body Builders Limited (Cause 355 of 2017)
[2022] KEELRC 1181 (KLR) (15 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1181 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 355 OF 2017
SC RUTTO, J
JULY 15, 2022**

BETWEEN

BENSON WANJALA WANYONYI CLAIMANT

AND

HAVEER BODY BUILDERS LIMITED RESPONDENT

JUDGMENT

1. The claimant initiated the suit herein vide a Memorandum of Claim filed on February 25, 2017. The Claim was later amended on April 24, 2019. Through the amended Memorandum of Claim, the claimant avers that he was employed by the respondent from February 1, 2014 as a welder. That he worked continuously and to the satisfaction of the respondent. He avers that on February 15, 2016, upon resuming from leave, the respondent's General Manager Mr. Gurman Singh, ordered him to go back home as there was no work for him. According to the claimant, this amounted to summary dismissal, which he terms as discriminatory, unfair, unlawful and inhumane. Consequently, the claimant seeks against the respondent compensatory damages, notice pay and unpaid leave days totaling the sum of Kshs 184,800/=.
2. The respondent neither entered appearance nor filed a response to the Memorandum of Claim despite being served. The claimant presented before Court an Affidavit of Service sworn on August 26, 2021 by one Owour Reen who avers that she effected service of the summons to enter appearance and amended Memorandum of Claim upon the respondent.
3. In absence of a response from the respondent, the matter was scheduled to proceed for formal proof pursuant to Rule 15 (3) of the *Employment and Labour Relations Rules*, 2016.



Claimant's case

4. At the start of the hearing, the claimant, sought to rely on his witness statement, which he asked the Court to adopt as his evidence in chief. He also produced the bundle of documents filed together with his claim as his exhibits before Court.
5. He testified that he was not informed of the reasons for his termination and that he was not issued with a notice prior to. He further stated that he had done nothing wrong to warrant summary dismissal by the respondent. It was the claimant's further testimony that his efforts to have the dispute resolved through the Transport Workers Union, proved futile. He asked the Court to allow his claim as prayed.

Submissions

6. The claimant submitted that there was no criterion applied in terminating him. That the manner in which he was selected was unfair as the same did not align with section 40 (1) (c) of the Employment Act. It was further submitted that due process was not followed in the termination of the claimant. The cases of Walter Ogal Anuro v Teachers Service Commission (2013) eKLR and Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others (2014) KLR were cited in support of the claimant's submissions.

Analysis and determination

7. From the pleadings on record as well as the evidence placed before court, the issues falling for the court's determination are;
 - a. Was the claimant's termination unfair and unlawful?
 - b. Is the claimant entitled to the reliefs sought?

Was the claimant's termination unfair and unlawful?

8. The claimant has alleged that his termination was illegal, unfair and unlawful. To resolve this issue, section 43(1) of the Employment Act (Act) is key, as it places the burden of proving the reasons for termination on an employer and failure to do so, such termination is rendered unfair. In addition, section 45 (2) of the Act, qualifies a termination of employment as unfair where the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.
9. The aforementioned statutory provisions constitute substantive justification and is also the first limb towards proving that a termination was either fair or unfair.
10. The second limb is with respect to procedural fairness and it is provided for under section 45 (2) (c) of the Act. In this regard, an employer is required to prove that it complied with the requirements of fair process in terminating the services of an employee. Section 41(1) of the Act stipulates in a detailed manner what entails fair procedure. Specifically, an employer is required to notify an employee of the intended termination. As such, the employee is to be notified of the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative.
11. The upshot of the foregoing is that, an employer must justify that there was reason to terminate the services of an employee and that such termination was undertaken in line with fair procedure.
12. Back to the case at hand, it is evident from the record before me that the reasons for the claimant's termination are not known at all as he was not issued with a letter of termination. The claimant avers that he was informed by the respondent through one Mr. Gurman Singh that there was no



work for him hence was ordered to go back home. This suggests termination by way of redundancy. Nonetheless, since there is no evidence before the Court to that effect, it only leaves room for speculation and remains unclear why the claimant was let go by the respondent.

13. Besides, there is no evidence that the claimant was notified of the reasons that may have led to his termination. Similarly, there is no evidence to suggest that he was given an opportunity to tender his defence against any allegations the respondent may have had against him.
14. Coupled with the foregoing, the respondent did not participate in the hearing nor tender a defence or any evidence whatsoever. As such, it did nothing to refute the assertions by the claimant, hence his case stands.
15. The net effect of the foregoing is that there is a probability that there were no reasons at all, to justify the claimant's termination and no disciplinary hearing or such related process was undertaken prior to the termination. In other words, the termination of the claimant did not meet the legal threshold set out under sections 41, 43 and 45 the Act.
16. The legal threshold in this regard could not have been put better as was done by the Court of Appeal in the case of *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR, thus: -

“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer.”

17. I fully adopt and reiterate the above determination and hold that the claimant's termination having failed to meet the legal threshold under the Act, has one resultant effect, that is, it was unfair and unlawful.



Appropriate Reliefs

18. As I have found that the claimant's termination was unfair and unlawful, I will award him six (6) month's gross salary as compensatory damages. This award has been informed by the length of the employment relationship.
19. The claimant is further awarded one (1) month's salary in lieu of notice.
20. As regards, the claim for leave, I will award the claimant a sum equivalent to 21 leave days as it is evident from the record that he proceeded for leave for 10 leave days in 2015 and 11 days in 2016. Cumulatively, the claimant had a balance of 21 leave days in 2015 and 2016, by the time he left the respondent's employment.

Orders

21. Accordingly, Judgment is entered in favour of the claimant against the respondent and he is awarded: -
 - a. Compensatory damages in the sum of Kshs 79,200/= which sum is equivalent to 6 months gross salary.
 - b. One month's salary in lieu of notice being Kshs 13,200/=.
 - c. Unutilized 21 leave days Kshs 9,240/=.
 - d. The total award is Kshs 101,640/=.
 - e. Interest on the amount in (d) at court rates from the date of Judgement till payment in full.
 - f. The claimant shall also have the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 15th day of July, 2022.

.....

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Alividsa

For the Respondent No appearance

Court Assistant Braille 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 March 15, 2020 and subsequent directions of April 21, 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

