



REPUBLIC OF KENYA



**Kabanya v Allobai (Cause 1486 of 2015)
[2022] KEELRC 3790 (KLR) (4 August 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3790 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1486 OF 2015
AN MWAURE, J
AUGUST 4, 2022**

BETWEEN

AGNES MGHOI KABANYA CLAIMANT

AND

SHEILA LOLANI ALLOBAI RESPONDENT

JUDGMENT

Introduction

1. The Claimant (Agnes Mghoi Kabanya) through a Memorandum of Claim filed on August 25, 2015 she alleges wrongful and unlawful dismissal, non-payment of dues and breach of her fundamental rights by the Respondent. She seeks that judgment be entered against the Respondent for:
 - (i) One month salary in lieu of notice Kshs. 16,000
 - (ii) Service payment Kshs. 28,800
 - (iii) Unpaid leave for 3 years Kshs. 48,000
 - (iv) Overtime payment Kshs. 5,184,000
 - (v) Compensation for wrongful and unfair termination Kshs. 192,000
 - (vi) Punitive and aggravated damages for breach of the Claimant's Constitutional rights
 - (vii) A declaration that she was wrongfully and unfairly dismissed from her employment.
 - (viii) Costs incidental to this suit.
2. The Respondent filed her Response to the Memorandum of claim together with a Counterclaim on September 27, 2016.



The Claimant's Case

3. The Claimant states that on or about the February 22, 2012 she was employed as a domestic servant by the Respondent. Her salary was Kshs. 16,000 per month. She avers that on or about June 22, 2015 her employment was verbally terminated.
4. It is the Claimant's case that she neither received prior notice of the Respondent's intention to terminate her nor payment in lieu of notice as well as the dues owed to her. She claims that she suffered emotional distress.
5. The Claimant avers that the Respondent's actions breached the actual and implied employment contract they had since she failed to give her reasonable notice prior to termination and adequate compensation. The Claimant states that the Respondent was well aware of the terms of the employment contract and her obligations in the event of termination. The Claimant had expectations that the Respondent would maintain her employment and would there be need to terminate her, it would be done in accordance with the contract and the Employment Act.
6. Additionally, the Claimant avers that the conduct of the Respondent was deliberate, actuated by malice and motivated by economic considerations despite the fact that she was an excellent employee whose performance always exceeded expectation.
7. In examination the Claimant said that the police arrested her on June 22, 2015 and was kept in holding for several days at Nyari Police Station without being told the reason for her arrest. She also claimed that she never went for leave since she started working for the Respondent. Additionally, the Respondent never remitted her NHIF and overtime. She alleges that she used to work for 6 days from 6 am to 10 pm with a one hour lunch break only. On some Sundays she would work also but would not receive any pay.
8. The Claimant, in her submission, submits that Section 41 of the Employment Act 2007 was not adhered to in her termination. She also adds that she did not absent herself from work as is claimed by the Respondent. Evidence for the said absenteeism has not been tendered before Court. She says that no matter what offence an employee is charged with, if the employee is not heard, the termination is unfair. Consequently, she submits that she is entitled to the reliefs sought in her application.

The Respondent's Case

9. On September 27, 2016, the Respondent herein filed her Response to the Memorandum of Claim together with a counterclaim. She first states that as far as description is concerned her name is Shahira Lalani Alibhai and not Sheila Lolani Allobai as was captured by the Claimant. She also states at the beginning that she is not currently employed and is a widow left with two children to support.
10. The Respondent admits that she employed the Claimant as a domestic worker and that her initial salary was Kshs. 13000 per month and thereafter increased with allowances of Kshs. 500 and Kshs. 3000.
11. The Respondent avers that the Claimant's services were not terminated as she alleges. She states that on June 22, 2015 the Claimant was taken away for questioning by the police and detained at Nyari Police station on the basis of intelligence pointing towards the Claimant's involvement in an attempted armed robbery carried out at the Respondent's home in December 2014. The Claimant never returned to work after the arrest.
12. It is the Respondent's case that the Claimant failed to attend to her duties. She adds that as a result of information of reasonable suspicion of criminal offences received from the police she was entitled



- to summarily dismiss her. However, the Respondent did not dismiss her. It is the Claimant who kept away from work and only showed up when she came to collect her belongings in the company of a police officer.
13. The Respondent states that together with her children they have suffered emotional distress from the criminal actions of the Claimant. The Claimant fundamentally breached her obligations of honesty and good faith by risking the life of the Respondent and her children. Her actions undermined the trust and confidence inherent in the nature of her work.
 14. The Respondent agreed that the Claimant was always a cheerful worker. She however stated that she was the author of her own misfortune. She denies not paying her overtime. The Respondent states that there were no conciliation efforts made by the Claimant and that even the demand letter was served to her together with the Memorandum of Claim.
 15. The Court has considered the respective submission by the Claimant. The Claimant in her submissions avers that she was arrested and held in police custody for several days. She was accompanied by the police officer to collect her belongings and was denied access to the Respondents premises thereafter. The Claimant submits that it was the Respondent's responsibility to show the Claimant absconded from her duties. In the absence of any such evidence the Court should find that he Claimant was unlawfully terminated and is entitled to the reliefs sought.

Decision

16. The Court is focusing on determining if the Claimant was unlawfully terminated or did she abscond from duty. The claimant insists she was arrested and held at the police station a few days. She says she tried to contact the Respondent but would not respond. She was accompanied by police officers to the Respondent's premises to collect her belongings. She says she was not paid her dues.
17. The case here is an interesting one. I have considered the evidence adduced, the pleadings and the submissions. I find the evidence tilts more in favour of the Claimant. The evidence adduced is that once the Claimant was arrested by the police on investigations of case of intent to rob the Respondent she never went back to work except to collect her belongings and even then in the company of the police. There is no evidence adduced that the Respondent instigated her arrest. In fact the respondent says she learnt that Claimant's fellow workers are the ones who reported to the police that she planned to commit robbery.
18. The Claimant had worked for the Respondent for about 3 years and there is no evidence that for those years she was connected with any criminal activities. It is curious that as per the Respondent's evidence one Janet who had worked for the Respondent for only one day is the one who reported the Claimant to the police with offence of intent to rob her employer. The employer says she was called by the police and was advised the Claimant intended to rob her. As a result the Claimant was arrested and since then never reported back to work. This far the evidence seems unbelievable that a worker who had worked for the respondent for only one day is the one who reported the intended robbery to the police. The Respondent seems not to have been aware of the said report until she was summoned to the police station by the police.
19. The Respondent thus far has no valid reason to terminate the Claimant as provided in Section 45 of the [Employment Act](#) 2007. The said section provides as follows:-

“ 45.



- (1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”

20. Furthermore the law provides that for any termination of employment should pass the fairness test. The fairness test as provided in Section 41 of the *Employment Act* states:-

“An employer shall before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee in a language the employee understand the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.”

21. There is no evidence that the Respondent attempted in anyway to find out details of the wrong doing of the Claimant and also she did not attempt to listen to the Claimant as to the purported wrong doing. She just says she was informed by the police that the Claimant was a hardened criminal and as a result she enhanced security and put CCTV cameras in her premises and eventually moved to an apartment. She says she did all that because of fear of the Claimant.
22. Yet it is noteworthy that despite police informing her the Claimant was a hardened criminal they did not prefer any charges against her.
23. Considering this case deeply, the Court is of the opinion that the Claimant was arrested on trumped up charges and for the same reasons lost her job. Yet there are authorities that make it clear that even if an employee is arrested it does not negate the disciplinary proceedings by the employer. In the case of *Abdi Mohammed Daib v Kenya Ports Authority* (2016) eKLR Cause No 760 of 2015 where it was held that:-

“the employer has managerial prerogative to discipline her employees for misconduct committed to her whenever she desired. Such managerial prerogative is not subject to any parallel or intended criminal proceedings unless the law or contract of employment expressly provides otherwise.”



24. The Court finds that the Respondent did not follow substantial justification and procedural fairness test is well articulated in the case of Walter Ogal Anuro v Teachers Service Commission Cause No 955 of 2011 where the Court held that:-

“for termination to pass the fairness test it ought to be shown there was not only substantive justification for termination but also procedural fairness.”

25. The upshot of the foregoing is that the Claimant was both unfairly and un procedurally terminated from her employment and judgment is entered in her favour.

Remedies

26. Having found that the Claimant was unfairly and unprocedurally terminated, I proceed to award her the following relief:-

- 1) One month salary in lieu of notice kshs 16,000/-
- 2) Service dues Kshs 28,800/-
- 3) Unpaid leave since Respondent did not have records to confirm leave was taken. So is awarded Kshs 48,000/-
- 4) Compensation for wrongful dismissal equivalent to 3 months Kshs 48,000/-

Total Awarded Kshs 140,800/-

27. Counterclaim by the Respondent for one month in lieu of notice is denied as the Claimant was unlawfully terminated.

28. Aggravated damages and security costs of Kshs 500,000/- continuing are also denied as there is no tangible evidence that Claimant is the cause of trauma and insecurity to the Respondent.

29. There is a certificate dated December 28, 2015 whereby there are amounts totaling Kshs 29,000/- indicated to have been paid to the Claimant but received on her behalf. It is not in evidence why the same should have been received by somebody else. The Court cannot regard the same as having been received by the Claimant.

30. Total award due to the Claimant is Kshs 140,800/- plus interest at Court rates from date of judgment fill full payment.

31. Costs are also awarded to the Claimant.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 4TH AUGUST 2022

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

