



**Minahila & another v Danaff Group (Cause 302 of 2016)  
[2022] KEELRC 12797 (KLR) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12797 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 302 OF 2016  
SC RUTTO, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**ABSALOM SILINGI MINAHILA ..... 1<sup>ST</sup> CLAIMANT**

**IGNATIUS SHAKAVA INGANJI ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**DANAFF GROUP ..... RESPONDENT**

**JUDGMENT**

1. The claimants aver through the instant suit that they were employed by the respondent on diverse dates. They aver that they were unlawfully dismissed by the respondent without any notice. As such they both claim against the respondent a joint sum of Kshs 963,000.00 being notice pay, compensatory damages and service pay.
2. The claim was opposed with the respondent denying the claimants' averment, that they were its employees. The respondent further termed the suit as fatally defective, incompetent, misconceived, an afterthought, vexatious and an abuse of court process. Consequently, the respondent has asked the court to dismiss the claim with costs.
3. The matter proceeded for hearing on March 7, 2022, and while the claimants presented oral evidence in support of their respective cases, the respondent failed to present any witnesses.

**1<sup>st</sup> Claimant's case**

4. The 1<sup>st</sup> claimant testified as CW1 and at the outset, sought to rely on his witness statement together with the documents filed with the claim, to constitute his evidence in chief. He also produced the said documents as his exhibits before court.



5. It was CW1's testimony before court that he was employed as a foreman by the respondent on or about April, 2012. That his monthly salary was Kshs 33,000/= . That further, the respondent did not issue him with an appointment letter. He further stated that he served the respondent with loyalty and diligence until December, 2015 when he was unlawfully dismissed from employment. That he was then transferred to another employer in Sultan Hamud where the working environment was extremely bad as there was no water and accommodation.

## **2<sup>nd</sup> Claimant's case**

6. The 2<sup>nd</sup> claimant testified as CW2. He also adopted his witness statement and documents filed together with the claim, to constitute his evidence in chief. He also produced the said documents as his exhibits before court.
7. It was his testimony before court that on or about January, 2014, he was employed by the respondent as a carpenter, on a monthly salary of Kshs 21,000.00. That the respondent did not issue him with an appointment letter. That he served with loyalty and diligence until April, 2015 when he was unlawfully dismissed by the respondent without notice or payment of his terminal benefits.

## **Respondent's case**

8. As stated herein, the respondent did not present oral evidence and its case is as per its defence through which it has denied employing the claimants.

## **Submissions**

9. The claimants filed joint submissions in which they submitted that they were unfairly, unlawfully and wrongfully dismissed from employment. That the respondent failed to observe the relevant provisions of the law in dismissing them from employment. It was their argument that the respondent failed to give them a valid reason for their dismissal. In support of their submissions, the claimants sought to rely on the cases of *Alphonse Sulpice Mzenge v Mombasa Air Safari Limited* (2013) eKLR and *Jackline Wakesho v Aroma Café* (2014) eKLR.
10. On its part, the respondent submitted that the claimants were casual employees and at no point in time were they converted to contract employees whose salaries were paid monthly. That further, the claimants did not work continuously and were only engaged when their services were needed. The respondent submitted that as such, the claimants' employment was terminable at the end of the day by either party.

## **Analysis and determination**

11. I have considered the issues raised in the pleadings, the evidence on record as well as the rival submissions and I have singled out the following issues for determination: -
- a) Was the claimants' termination from employment unfair and unlawful?
  - b) Are the claimants entitled to the reliefs sought?  
Was the claimants' termination unfair and unlawful?
12. Before I venture into this issue, I need to address a question regarding the nature of the employment relationship between the parties. At the outset, it is noteworthy that the issue was not pleaded at all by the respondent. Indeed, the respondent never raised the same in its defence and never presented any evidence to that end. If anything, it denied the existence of the employment relationship in its defence.



13. As it is, the issue was only brought up by the respondent in its submissions. It is trite law that submissions are not evidence. If at all, the respondent considered the claimants as casual employees, then nothing stopped it from expressly pleading the same in its defence and leading evidence to prove as much.
14. On this issue, I will follow the determination by the Court of Appeal in *Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another* [2014] eKLR where it was held that: -
- “We have already found that the 1<sup>st</sup> respondent failed to discharge his burden of proof of the existence of facts claimed of the companies, what they owned and whether property sales indeed took place, followed by transfers. So what we conclude is that the learned trial judge simply lifted the figure of sh 80,161,720/= from the 1<sup>st</sup> respondent’s submissions and awarded it against the appellant. This was wholly in error. Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.” Underlined for emphasis
15. In any event, pursuant to section 10 (7) of the *Employment Act*, the respondent being the employer, was under an obligation to prove the fact that the claimants were casual employees. The said statutory provision is couched as follows: -
- “if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”
16. This position was reiterated by the Court of Appeal in *Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune* [2021] eKLR where it was held that: -
- “[15]. In any event, as per the respondent, the burden lay with the appellant by virtue of section 10(7) of the *Employment Act* to establish the terms of her employment. His failure to render any employment record meant that the appellant had not established his allegations that she was a casual employee. Besides, the respondent submitted that having worked for the appellant from August, 2010 until November, 2013, the appellant was estopped by section 37 of the *Employment Act* from claiming that she was a casual employee.”
17. The long and the short of it is that, it was not sufficient for the respondent to submit that the claimants were casual employees, when it failed to plead the same and basically did nothing to prove that fact.
18. That said, I now move to determine whether the claimants’ termination was unfair and unlawful.
19. The claimants have alleged that they were unfairly and unlawfully terminated from employment. Pursuant to sections 43, 45 and 41 of the *Employment Act*, an employer is required to prove that there was substantive justification to warrant an employee’s termination and that such an employee was accorded procedural fairness. Essentially, this is the standard for determining whether an employee’s termination was fair or not.



20. Substantive justification entails proof of the reasons which resulted in an employee's termination. Section 43(1) of the *Employment Act*, requires an employer to prove the reason or reasons for the termination, and where it fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
21. Section 45 (2) (a) and (b) of the *Employment Act* goes ahead to provide 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 its operational requirements.
22. As regards the limb of procedural fairness, the same can be traceable to section 45(2) (c) of the *Employment Act*, which provides that for termination to be fair, it ought to be in line with fair procedure. Section 41(1) of the *Employment Act* sets out the specific requirements of a fair hearing. This procedure entails 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.
23. The above legal threshold was aptly summarized by the Court of Appeal in the case of *Janet Nyandiko vs 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.”

24. Back to the instant case, it is discernible from the record that the respondent did not give any reason that led to the claimants' termination from employment. It did not even suggest in a remote manner, the reason behind the cessation of the employment relationship and its sole defence was that, the claimants were not its employees.



25. To this end, the respondent did not present any evidence to prove the validity and fairness of the claimants' termination.
26. As per the legal threshold established in the *Employment Act*, the respondent was bound to prove that it had valid and fair reasons to let go of the claimants. As a result, the claimants' termination was unfair in terms of sections 43(1) and 45(2) (a) and (b) of the *Employment Act*.
27. As regards fair process, the respondent yet again failed to lead evidence to prove the same. As stated herein, its only contention was that the claimants were not its employees. In light of the provisions of section 45(2) (c) as read together with section 41 of the *Employment Act*, the respondent was bound to subject the claimants to a fair process prior to termination. There being no evidence let alone, a suggestion that the claimants were subjected to a fair process prior to termination, I am led to conclude that no such process was undertaken.
28. In the circumstances, I cannot help but find that the respondent is at fault for want of procedure.
29. The totality of my findings is that the claimants' termination was unfair and unlawful in terms of sections 41, 43 and 45 of the *Employment Act*.

### **Appropriate Reliefs**

30. Having found that the claimants' termination was unfair and unlawful, the court awards the 1<sup>st</sup> claimant five (5) months' gross salary as compensatory damages while the 2<sup>nd</sup> claimant is awarded four (4) months' gross salary as compensatory damages. This award takes into account the respective length of the employment relationship between the claimants and the respondent.
31. Each of the claimants is further awarded one (1) month's salary in lieu of notice and service pay for the respective years served.

### **Orders**

32. In the end, I enter Judgment in favour of the claimants against the respondent and the court makes the following award: -

#### 1<sup>st</sup> claimant

- a. One month's salary in lieu of notice being the sum of Kshs 25,500.00, calculated at Kshs 850.00 per day.
- b. Compensatory damages in the sum of Kshs 127,500.00 which sum is equivalent to 5 months gross salary.
- c. Service pay for 3 years being the sum of Kshs 76,500.00.
- d. The total award is Kshs 229,500.00.
- e. Interest on the amount in (d) at court rates from the date of Judgement until payment in full.

#### 2<sup>nd</sup> Claimant

- a. One month's salary in lieu of notice being the sum of Kshs 21,000.00 calculated at Kshs 700.00 per day.
- b. Compensatory damages in the sum of Kshs 84,000.00 which sum is equivalent to 4 months gross salary.
- c. Service pay for 1 year being the sum of Kshs 21,000.00.



d. The total award is Kshs 126,000.00.

e. Interest on the amount in (d) at court rates from the date of Judgement until payment in full.

33. The claimants shall have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimants Ms. Rashid

For the Respondent Ms. Kirui

Court Assistant Abdimalik Hussein

**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**

