



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ojwang' v Finejet Limited (Cause 1623 of 2018)  
[2022] KEELRC 4152 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4152 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1623 OF 2018  
JK GAKERI, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**MICHAEL ONYANGO OJWANG' ..... CLAIMANT**

**AND**

**FINEJET LIMITED ..... RESPONDENT**

**JUDGMENT**

1. Vide a Memorandum of Claim filed on December 10, 2018, the claimant instituted proceedings against the respondent alleging unlawful termination of employment and non-payment of terminal dues.
2. The claimant prays for;
  - a. The sum of Kshs 2,640,000.00 as particularized in paragraph 3(g) above comprising;
    - i. Salary *in lieu* of notice Kshs 165,000/=
    - ii. Service pay (Kshs165,000 x 2 years) Kshs 330,000/=
    - iii. Outstanding salary for October Kshs 165,000/=
    - iv. 12 months compensation Kshs 1,980,000/=Total Kshs 2,640,000.00
  - b. Costs of the cause.
  - c. Interest on (a) and (b) at court rates.



### **Claimant's case**

3. The claimant avers that he was employed by the respondent on January 1, 2016 as the Aviation Operations Manager at a monthly salary of Kshs 165,000/= and served the respondent diligently and faithfully until October 31, 2018 when the respondent unilaterally terminated his employment.
4. The claimant further avers that he reported to the office at 8.00 am on October 2, 2018 and worked the entire day, until 5 pm when he was issued with a termination letter dated October 1, 2018. The letter directed him to proceed on leave from October 1, 2018 and handover any company assets including the employment card.
5. That the respondent did not provide any reason (s) for the termination of the claimant's employment and he was not accorded a hearing and the respondent did not pay the salary for October 2018 as well as final dues.
6. It is the claimant's case that the respondent withheld the claimant's salary to pay amounts owed to Finejet Sacco Ltd without the claimant's consent and the claimant did not owe the Sacco anything.
7. It is the claimant's case his termination from employment was wrongful, unfair, malicious and a violation of his rights.

### **Respondent's Case**

8. The respondent filed its response on March 6, 2019 denying that termination of the claimant's employment was unlawful, illegal or unfair.
9. It is the respondent's case that termination of the claimant's employment was lawful and in full compliance with the terms of employment.
10. The respondent further avers that the payment made to Finejet Sacco Ltd was lawful as it was based on a loan statement presented to the respondent and the claimant by the Sacco and any surplus paid to the Sacco should be claimed from the Sacco not the respondent.
11. Finally, the respondent avers that the suit is frivolous, vexatious and misconceived and should be dismissed with costs.

### **Claimant's evidence**

12. The claimant adopted the written statement dated December 14, 2018 and was cross-examined. He testified that he had no issue on performance and his appraisals by the employer were good nor had he been put on a performance improvement plan.
13. He further testified that before termination, he had not been issued with any notice on performance or conduct. That he served the respondent for 2 years 9 months and was not paid for outstanding 14 leave days.
14. On cross-examination, the witness confirmed that the termination notice was given at 5 pm.
15. The witness confirmed that he had not made a claim for leave days.
16. The witness confirmed that he had loans with Finejet Sacco and Gulf Bank and had authorised the respondent to deduct payments to the Sacco and the Bank.
17. It was his testimony that the amount of Sacco loan outstanding was not resolved.



18. On re-examination, the witness stated that he did not sign the letter of termination and could not have envisioned a termination of employment. The witness admitted that the Sacco was managed by the employer and he had guarantors for the loan as required by law.
19. That on October 5, 2018, the respondent confirmed that the claimant had no outstanding loan with the Sacco.

### **Respondent's evidence**

20. RWI, Mr John Kimani, on cross-examination confirmed that the claimant had a clean record.
21. He testified that the contract dated December 18, 2015 was the basis of the relationship between the claimant and the respondent.
22. That both parties had the right to terminate the contract by notice or pay *in lieu* of notice.
23. The witness confirmed that the termination letter made no reference to a hearing or meeting or adherence to due process or appeal.
24. On service pay, the witness stated that the same was discretionary since the respondent was remitting NSSF contributions and the employment contract made no provision for it. It was RWI's testimony that service pay was discretionary.
25. The witness confirmed that the letter dated October 5, 2018 confirmed that the claimant had no outstanding Sacco loan but made reference to the Gulf Bank loan.
26. It was his testimony that the claimant was paid one month's salary *in lieu* of notice.
27. The witness testified that the sum of Kshs 92,826/= owed to the Sacco was not set out in the termination letter.
28. On re-examination, the witness disagreed with the claimant's computation of service pay. The witness stated that the claimant authorised the respondent to remit the amount to Gulf bank.
29. Finally, RWI testified that termination of the claimant's employment was not based on a disciplinary issue.
30. RWII, Jacinta Murugi confirmed on cross-examination that the respondent and the Sacco are different legal entities though the Sacco is owned by employees of the respondent and membership was voluntary. She testified that employee could continue being a member after leaving employment. That the claimant could have made private arrangements to pay the Sacco loan.
31. It was her testimony that as at the date of termination, the claimant owed the Sacco Kshs 92,826/= and was unaware of the letter dated October 5, 2018.
32. The witness admitted that she was the author of the confusion on the figures owed to the Sacco.
33. She confirmed that the respondent had no authority to deduct the sum of Kshs 92,826/= owed to the Sacco as the authority given in the application letter related to salary deductions.
34. The witness further confirmed that the balance was not paid to the claimant.
35. On re-examination, the witness stated that the claimant contested the amount outstanding as Sacco loan but did not provide a different computation.
36. That the Sacco loan had no security and there were no guarantors.



## Claimant's Submissions

37. The claimant submitted on three issues including costs.
38. As to whether termination of the claimant's employment was unfair and illegal, it is argued that the respondent's defence of reliance on clause 23 of the contract of employment was a return of the doctrine of "termination at will of the employer" contrary to the provisions of the Employment Act and Article 41 of the Constitution of Kenya, 2010.
39. Reliance is made on the decisions in Kenfreight (EA) Ltd V Benson K Nguti (2016) eKLR, International Planned Parenthood Federation V Pamela Ebot Arrey Effiom (2016) eKLR to urge that the respondent had no reason to terminate the claimant's employment and the essence of compliance with the provisions of the Employment Act, 2007 on termination such as section 41, 41, 43, 45 and 47. It is submitted that the Employment Act prescribes the minimum terms.
40. It is further urged that the respondent violated the provisions of section 43 and 45 of the Employment Act for failure to provide the reason(s) for termination.
41. The decisions in Walter Ogal Anuro V Teachers Service Commission (2013) eKLR and Swaleh David V Premier Cookies Ltd (2021) eKLR are relied upon to buttress the submission.
42. As regards the reliefs sought, it is urged that the claimant is entitled to salary *in lieu* of notice and October 2018 salary since his employment was terminated instantaneously and did not serve the notice period.
43. On service pay, the claimant submits that although it was not a contractual obligation of the respondent, his employment was unceremoniously brought to an end and one (1) month salary for each year served, a sum of Kshs 330,000/= was not fair.
44. On compensation, reliance is made on the decision in Kenfreight (EA) Ltd V Benson K Nguti to urge that the claimant had established that termination of his employment by the respondent was unfair and illegal and the claimant was a senior employee with a clean record, was humiliated and the respondent did not issue a certificate of service.

## Respondent's Submissions

45. The respondent urges that paragraph 3(c) and (3) of the statement of claim and witness statement respectively, confirm that the claimant remained in the respondent's employment until October 31, 2018 and thus served the notice period.
46. It is Submitted that the termination notice was issued pursuant to the provisions of clause 23 of the claimant's employment contract which allowed either party to terminate the contract by a written notice and no reason was required.
47. It is the respondent's Submission that courts of law cannot rewrite a contract.
48. Reliance is made to the decision in Kenya Revenue Authority V Mengiya Salim Murgani (2010) eKLR to urge that a contracting party need not rely on misconduct to terminate a contract of service and can do so without giving any reason as the Court of Appeal expressed itself in that case.
49. Further, the decision in Manuel Anidos V Kinangop Wind Park Ltd (2019) eKLR is relied upon to urge that the claimant had not discharged the burden of proof that termination of his employment was unprocedural and in contravention of the employment contract.



50. It is submitted that the claimant was not entitled to service pay as he was a member of the NSSF and thus section 35(6) of the *Employment Act* applied.
51. The respondent submits that the claimant has not denied that he had outstanding loans and had authorised the respondent to remit the entire salary and terminal dues to his salary account for purposes of the Gulf Bank loan.
52. It is submitted that the cheque dated November 8, 2018 and the bank deposit slip show that his dues were paid through his account.
53. The court is urged to dismiss the claim with costs.

### **Determination**

54. The issues that commend themselves for determination are;
  - i. Whether termination of the claimant's employment was fair and lawful.
  - ii. Whether the claimant is entitled to the reliefs sought.
55. As to whether termination of employment was fair and lawful, the homeport are the provisions of the *Employment Act* relating to termination of employment and principal among them are the provisions of section 35 and 36 on notice, section 40 on redundancy, section 41 on the procedure to be complied with, section 43 on the burden of proof, section 45 on the reason(s) and process and section 47(5) on justification of the grounds.
56. Section 45(2) of the Act provides that;  
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 employee's 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.
57. The net effect of the foregoing provisions and those of other sections outlined above as interpreted by the Court of Appeal in numerous decisions is that, for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair (See *Walter Ogal Anuro V Teachers Service Commission (Supra)*, *CMC Aviation Ltd V Mohammed Noor*, *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR, *Jenny Luesby V Standard Group Ltd* (2019) eKLR among others.)
58. A termination of employment may be substantively and procedurally unfair or substantively or procedurally unfair.
59. For termination to meet the legal threshold, it must pass the fairness test.
60. In the instant case, there is no dispute that the claimant was an employee of the respondent from January 1, 2016 upto October 31, 2018 when his services were terminated by the respondent.



61. As at the date of termination, the claimant's monthly salary stood at Kshs 165,000/= paragraph 23 of the Employment Agreement dated December 18, 2015 stated as follows;

“You or Finejet may terminate this agreement and your employment at any time upon giving one month written notice to the other party. Notwithstanding the foregoing, the employer may terminate this agreement immediately upon paying to you one month salary in lieu of notice of such notice.”

62. The respondent submits that it invoked this clause to terminate the employment agreement with the claimant and thus did so in accordance with the terms of the contract.

63. The respondent further argued that the duty of courts is not to rewrite contracts between the parties but to enforce them.

64. The letter of termination of the claimant's employment dated October 1, 2018 under the reference 'Notice of termination of Employment' stated in part;

“This letter serves as notice that your employment at Finejet Ltd will be terminated after one month from the date hereof. This is in accordance with clause number 23 of your employment agreement that you signed with Finejet which states . . .

Therefore your employment will end on October 31, 2018.

The company will settle the following amounts due to you;

1. October 2018 salary: Kshs 165,000/=

2. Service pay: Kshs 165,000/=

These amounts will be paid to Finejet Sacco Ltd to offset part of the loan you have with Finejet Sacco Ltd . . .

You are required to handover any company assets that may be in your possession including your employee card . . .“

65. The claimant did not acknowledge receipt of the letter and confirmed as much on cross-examination.

66. Relatedly, by letter dated October 5, 2018, the Managing Director of the Respondent, Mr John Kimani informed the claimant that he had no outstanding loan with Finejet Sacco Ltd. The letter states in part;

“On our letter to you dated October 1, 2018 referenced as above, we indicated your October, 2018 salary as well as your service pay would be used to offset your Finejet Sacco Loan. This was a typing error, you do not owe Finejet Saco any money.

However, as per your signed agreement with Gulf Bank, these payments will be made to the bank to offset part of your loan with them.”

67. However, by an email dated November 4, 2018 at 4 pm, RWI informed the claimant that he had an outstanding loan with Finejet Sacco of Kshs 92,826/= and the same would be recovered from his terminal dues. By an email dated November 5, 2018, the Claimant protested the respondent's lack of consistency on the outstanding Finejet Sacco Loan.

68. There was no agreement between the parties on the actual Finejet Sacco Loan due from the claimant.



69. From the letter of termination, it is clear that the respondent provided no reason for termination of the claimant's employment and submitted as much.
70. The termination process in this case echoes the circumstances in *Kenfreight (EA) Ltd V Benson K Nguti* (2016) eKLR where the appellant terminated the respondent's employment by giving a one month's notice which the appellant paid for upfront.
71. It was held that although the appellant had complied with the terms of sections 35(1)(c) of the *Employment Act*, 2007, it was unable to establish that the termination of employment was compliant with the provisions of the *Employment Act*. The court went to great lengths to explain that the *Employment Act*, 2007 and other statutes enacted on the recommendations of a taskforce appointed by the Attorney General changed the landscape of labour and employment matters in Kenya as it inter alia overthrew the former order which gave employers unrestricted power to dismiss an employee for no reason and without due process.
72. The court expressed itself as follows;
- “ . . . The *Employment Act* for example introduced and prescribed minimum terms which the parties must consider as they contract. It established the concept of fair hearing and placed a duty on an employer to give reasons before dismissing or terminating the services of an employee. These developments are a stark departure from the traditional power of the employer to terminate or dismiss at will as demonstrated in the earlier decisions of the courts.”
73. As regards notice, the respondent's letter to the claimant dated October 1, 2018 stated that the claimant's employment would end on October 31, 2018 from October 1, 2018.
74. Although the claimant declined to sign the letter, he received it allegedly on October 2, 2018. The respondent did not contradict this date. As adverted to elsewhere, clause 23 of the Employment Agreement provided for termination of the agreement by either party giving the other “one month written notice” which in law means one calendar month.
75. In this case, the claimant was accorded a notice shorter than one month as the notice was served upon the claimant on October 2, 2013.
76. It is the finding of the court that the respondent's one month termination notice was ineffectual.
77. Strangely, the claimant appear to have opted out of the contract of employment and consulted an advocate who wrote to the respondent the letter dated October 24, 2018.
78. The claimant could not have regarded himself an employee of the respondent by October 24, 2018 as he was challenging the termination notice dated October 1, 2018.
79. Finally, as regards the reason(s) for the termination of employment, the court is guided by the sentiments of the Court of Appeal in *Kenfreight (EA) Ltd V Benson K Nguti* (Supra) as follows;
- “The next and more critical question is whether the termination was unfair. It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, the reason related to the employee conduct . . .”
80. In the instant case, the respondent's witness testified that the employer exercised his right to terminate the contract and did not have to give any reason.



81. It is unclear why the respondent decided to terminate the claimant's employment as it does not appear to have had any complaint against him and led no evidence of any misconduct.
82. For these reasons, it is the finding of the court that the respondent has on a balance of probability failed to demonstrate that it had a valid and fair reason to terminate the claimant's employment.
83. On matters procedure, the sentiments of the Court of Appeal in *Kenfreight (EA) Ltd V Benson K Nguti (Supra)* are illustrative as follows;

“A part from issuing proper notice, according to the contract (or pay *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 reasons for which the employer is considering termination of the contract. In addition an employee is entitled to be heard and his representation, if any, considered before the decision to terminate his contract of service is taken.” (See also *Postal Corporation of Kenya V Andrew K Tanui* (2019) eKLR).

84. As explained by the Court of Appeal in *Pius Machafu Isindu V Lavington Security Guards Ltd (Supra)*, section 41 of the *Employment Act* provides the mandatory process to be complied with by an employer before terminating an employee's employment contract or dismissal.
85. In this case, RWI confirmed that the claimant was not taken through any disciplinary process nor was he notified of the right to appeal the decision to terminate his employment.
86. Failure by the respondent to comply with the provisions of section 41 of the *Employment Act* rendered the termination of the claimant's employment procedurally flawed and unfair.
87. As to whether the claimant is entitled to the reliefs prayed for, the court is guided by the sentiments of the Supreme Court in *Kenfreight (EA) Ltd V Benson K Nguti* (2019) eKLR as follows;

“Guided by the above analysis, we find that once a court has reached a finding that an employer has unlawfully terminated an employee's employment, the appropriate remedy is the one provided under section 49 of the *Employment Act*. We also need to clarify that a payment of an award in section 49(1)(a) is different from an award under section 49(1)(b) and (c). Section 49 allows an award to include any or all of the listed remedies provided that a court in making the award exercises its discretion judiciously and is guided by section 49(4) . . .”

i. Salary in lieu of notice Kshs 165,000/=

88. Having found that the termination notice dated October 1, 2018 was ineffectual for not meeting the threshold of one month provided by clause 23 of the Employment Agreement, the claimant is awarded Kshs 165,000/= *in lieu* of notice.

ii. Withheld salary for October 2018 Kshs 165,000/=

89. Appreciating that the claimant had consulted an advocate by October 24, 2018 to contest the unlawful termination, he could not be heard to say that he was still an employee of the respondent.

Consequently the court awards the claimant salary for the 23 days equivalent to Kshs 126,500/=.

iii. Service pay



90. It is not in dispute that service pay was not contractually agreed upon by the parties nor was it incorporated in the Employment Agreement.
91. Strangely, the respondent promised the sum of Kshs 165,000/= as service pay and RWI confirmed as much. Question is whether the claimant has established entitlement to service pay.
92. RWI confirmed on cross-examination that the amount promised was discretionary since it was deducting and remitting NSSF contributions on behalf of the claimant.
93. The claimant tendered no evidence of entitlement to service pay.
94. More significantly, the claimant provided no consideration for the respondent's promise to pay the Kshs 165,000/=.
95. Finally, since the respondent was deducting and remitting NSSF contributions, the claimant was not entitled to service pay by dint of section 35(6)(d) of the Employment Act.

The prayer is declined.

iv. 12 months compensation

96. Having found that termination of the claimant's employment was unfair for non-compliance with the provisions of the Employment Act, the claimant is entitled to the relief provided by section 49(1) (c) of the Employment Act.
97. The relief entails compensation upto a maximum of 12 months which the Court of Appeal has variously emphasized should only be awarded in exceptional circumstances.
98. In determining the level of compensation, the court is enjoined to take into consideration the circumstances outlined in section 49(4) of the Employment Act.

In this case, the court has considered the following;

- i. As the claimant's counsel submits, the claimant was a high ranking employee of the respondent and therefore unlikely to secure similar employment immediately.
  - ii. The claimant served the respondent for about 2 years, 9 months and wished to continue.
  - iii. The claimant had no record of misconduct or warning letter or questionable performance.
  - iv. The claimant did not appeal the termination of employment or respond to the termination letter.
99. In light of these circumstances, the court is satisfied that the equivalent of 2 months' salary is fair Kshs 330,000/=.
  100. The last issue is the use of the claimant's dues to pay-off alleged outstanding loan with the Finejet Sacco Ltd and Gulf Bank.
  101. As regards the Gulf Bank Loan, the claimant had expressly authorised the respondent to use his dues to pay-off any outstanding loan.



102. Paragraph B the Bank Personal Unsecured Facility Application Form dated May 7, 2018 states in part;
- “In the event of my resignation or termination from employment for any reason whatsoever, I hereby authorise my employer to withhold my terminal benefits and remit them directly to my Gulf Africa Bank facility account as per the account details below . . .”
103. Pursuant to this contractual term, the respondent remitted the sum of Kshs 57,858.75 by Cheque No 001916 dated November 8, 2018. Nothing turns on this payment.
104. As regards the Finejet Sacco Ltd Loan, there does not appear to have been an agreement on the amount owed by the claimant. Strangely, the respondent exacerbated the confusion by its letters dated October 1, 2018, October 5, 2018 and the emails dated 4<sup>th</sup> and 5<sup>th</sup> November, 2018 from RWI and RWII. Whereas the letter dated October 1, 2018 implied that the claimant had a Sacco loan, the letter of 5<sup>th</sup> October was emphatic that the reference to a Sacco loan in the termination letter was a typing error and no amount was owed to the Sacco. About a month later, the emails from RWII re-introduced the Sacco Loan which the claimant contested.
105. As a consequence, the claimant was not paid terminal dues.
106. For unexplained reasons, the respondent did not disclose how much it used to repay the loan and how much was paid to the claimant.
107. Instructively, the Claimant had not authorised the respondent to use its dues to set-off the Finejet Sacco Loan analogous to the Gulf Bank loan and the claimant was not consulted before the decision was made or concurrence sought.
108. This unilateral action by the respondent violated the claimant’s right to fair labour practices. In the absence of a contractual undertaking by the claimant, his concurrence was essential.
109. The court is in agreement with the sentiments of the court in *Alice Ndaani & 5 others V Mwalimu National Savings and Credit Co-operative Society Ltd* (2021) eKLR as follows;
- “As rightly submitted by the respondent, Loan agreements are distinct and independent from employment contracts. It is my view that recalling Sacco loans prematurely and offsetting the same using employment terminal dues amounts to breaching obligations under employment contract by an employer. It is violating employee’s right to fair labour practices under Article 41 of the *Constitution* . . .
- In my view, unless there is clear agreement or policy to the effect that outstanding loans of exiting employees are to be offset from terminal dues, the employer must never withhold such terminal dues from the exiting employee. The outstanding loan of an exiting employee must be recovered strictly under the loan agreement and any guarantee agreement.”
110. The claimant is thus entitled to the amount used by the respondent to offset the Finejet Sacco Loan.
111. In conclusion, judgement is entered for the claimant against the respondent in the following terms;
- a. Pay *in lieu* of notice Kshs 165,000/=
  - b. Pay for 23 days worked in October, 2018 Kshs 126,500/=
  - c. Equivalent of 2 months salary Kshs 330,000/=
  - d. Costs of this suit.



- e. The amount used by the respondent to off-set the alleged Finejet Sacco Loan.
- f. Interest at court rates from date of judgement till payment in full.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 29TH DAY OF SEPTEMBER 2022**

**DR. JACOB GAKERI**

**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 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 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 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.

**DR. JACOB GAKERI**

**JUDGE**

