



REPUBLIC OF KENYA



**Ndunda v Dimamu Agencies Ltd (Cause 685 of 2016)
[2022] KEELRC 12688 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12688 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 685 OF 2016
JK GAKERI, J
SEPTEMBER 28, 2022**

BETWEEN

FRANCIS KYALO NDUNDA CLAIMANT

AND

DIMAMU AGENCIES LTD RESPONDENT

JUDGMENT

1. The Claimant initiated this suit by a memorandum of claim dated 20th April 2016 and filed on 22nd April 2016 September 2017 alleging unfair and illegal termination from employment and refusal by the Respondent to pay terminal dues.
2. The Claimant prays that: -
 - i. The respondent be ordered to pay the claimant his terminal and contractual dues amount to Kshs.421,206.00/=
 - ii. Costs of this claim and interest thereon at court rates;
 - iii. A declaration that termination of the Claimant's employment was unfair and unjust;
 - iv. Any other relief that this court may deem just and fit to grant.

The claimant's case is pleaded as follows:

3. That he was employed by the respondent on 3rd January 2011 as a loader, earning a monthly salary of Kshs.7,280/=. That during his termination on 9th May 2015, his salary had risen to Kshs.10,400/=.
4. The Claimant avers that the decision to terminate his services was unfair as his fundamental rights as an employee provided under the law were grossly violated as the Respondent had failed to proffer factual and genuine reasons for the decision to terminate his employment.



5. In conclusion, the Claimant avers that the respondent has, despite demand failed to pay his contractual and terminal dues and issue him with a certificate of service as required by the law.

Respondent's case

6. In its statement of response filed on 9th June 2016, the Respondent denies the Claimant's allegations of termination of employment and urges the Court to strike out the claim for being bad in law and ex-facie incompetent therefore amounting to an abuse of the court process.
7. The Respondent denies the claimant's allegation that he was employed as a loader from 3rd January 2011 to 9th May 2015. It instead avers that the claimant was engaged on a casual basis.
8. Regarding termination, the respondent avers that it did not terminate the claimant's services as alleged but rather the claimant voluntarily left employment on 6th July 2015 following a disagreement with weighbridge inspectors at Mombasa Cement Limited over several incidences of loading trucks with excess bags of cement which was an attempt to commit theft and did not return to work thereafter.
9. The respondent avers that it was not obligated to serve the claimant with a month's notice as it did not initiate termination of his services.
10. In addition, it maintains that the claimant was duly paid his wages for the month up to the 6th of July 2015 which was his last day of work. That there are no other terminal dues payable to the claimant in the circumstances.
11. In conclusion, the respondent prays that the claimant's suit be dismissed with costs to it.

Evidence

12. At the hearing, the claimant appeared as CW1, adopted his witness statement as his evidence in chief and was cross examined.
13. CW1 testified that contrary to the Respondent's allegations, he did not proceed on leave and had worked on 9th May 2015 which was his off day. He stated that on reporting to work on that date at 2:00pm, his supervisor told him to go to the office where he was informed that there would be no work for him.
14. The claimant told the court that he was not given a hearing and that he thereafter visited the labour office but was not satisfied with its decision. He further testified that he did not receive a warning letter on 25th October 2011. It was his testimony that the letter dated 28th May 2015 bore a signature it was not his. He therefore maintained that he had been terminated from employment.
15. On cross examination, CW1 confirmed that there was a disagreement between himself and a weighbridge inspector. He also confirmed that he received the warning letter dated 3rd August 2012 and had signed it.
16. He also testified that he did not accept a sum of Kshs.17,000/= recommended by the Labour Officer.
17. The respondent's one Simon Lukhulu Opicho testified as RW1. He adopted his witness statement as evidence in chief and filed documents as exhibits.
18. RW1 testified that the claimant worked 6 days per week and had one rest day and did not work on public holidays.



19. During cross examination, RW1 testified that the claimant's employment was terminated because he used to load excess bags of cement. He however admitted that he had no evidence to prove this allegation.
20. RW1 further testified that the claimant was given a hearing and was also paid all his dues. He did not provide any evidence for this.
21. RW1 testified that since the claimant was contracted to work as a casual employee, he could proceed on leave whenever he wished. He testified that the Respondent's company was ready to pay the claimant Kshs.17,000/= as determined by the labour officer although this is not an admission of wrong doing.

Claimant's submissions

22. The Claimant identified the following issues for determination:
 - a. Whether the claimant was employed by the Respondent
 - b. Whether the claimant was unfairly terminated by the Respondent.
 - c. Whether the claimant is entitled to the prayers sought.
23. As regards employment, the Claimant submitted that the Respondent had not denied that he was their employee and therefore urges the court to hold as such.
24. As regards termination, the claimant submitted that the actions leading up to his termination show that the decision to terminate his employment was unlawful and unfair as the respondent did not comply with the provisions of Sections 41 and 45 of the *Employment Act*.
25. Reliance was placed on the decision in *Mary Chemweno Kiptui vs Kenya Pipeline Company Limited* (2014) eKLR.
26. As to whether the Claimant is entitled to the reliefs sought, the claimant submitted that given that the respondent had led no evidence to prove payment of the dues sought, he was properly entitled to the same and urged the court to allow the prayers.

Respondent's Submissions

27. The Respondent maintained that it had paid the claimant his dues. It submitted that the statutory deductions such as NHIF and NSSF had been duly made.
28. The respondent concluded by stating that given that the claimant had sought the intervention of the labour office and subsequently refused the settlement recommended by the Labour Officer, the claim should be dismissed with costs.

Determination

29. The issues for determination are;
 - i. Whether termination of the Claimant's employment was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
30. As to whether termination of employment was unfair, the starting point are the facts on record.
31. There is no dispute that the Claimant was an employee of the Respondent from sometime in 2011 and left employment sometime in 2015.



32. There is no agreement on when and how the separation took place. While the Claimant alleges that it took place on 9th May, 2015 when the Supervisor one Mr. Karanja told them that there would be no work, the Respondent maintains that the Claimant left on 6th July, 2017 when he was chased away by the weighbridge inspector, Mr. Depak over loading of bags of cement. The Claimant on cross-examination admitted that indeed there was a disagreement with the weighbridge inspector which would appear to contradict his earlier evidence of being dismissed in the office by a Mr. Karanja.
33. Puzzlingly, in his examination in chief, the Claimant denied having received or signed the letter dated 28th May, 2015 but on cross-examination, he admitted having received and signed it, which dents his credibility. In addition the Claimant did not disclose when he approached the Labour Office or the letter he was given.
34. The provisions of the *Employment Act*, 2007 provide for both substantive justification for the termination of employment and fair procedure. The provisions of sections 41, 43, 44, 45 and 47(5) of the Act embody these requirements. These provisions are unambiguous that for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair. This position finds support in *Naima Khamis v Oxford University Press (EA) Ltd* (2017) eKLR as well as *CMC Aviation Ltd V Mohammed Noor* (2015) eKLR.
35. From the documents on record, the Claimant had at least two warning letters and all related to his work as a loader and in particular loading of extra bags of cement.
36. The Respondent's witness admitted that the Claimant was chased by the weighbridge inspector on 6th July, 2015 and never resumed duty thereafter.
37. Section 43(2) of the *Employment Act* provides;
The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employer.
38. For the above stated reasons, the court is satisfied that the Respondent had a valid and fair reason to terminate the Claimant's employment.
39. As regards the procedure employed by the Respondent, although RWI, Mr. Simon Lukhula Opicho testified that there was a hearing, he provided no evidence of when and how it took place or its outcome. The Claimant's evidence that he was not subjected to a disciplinary process is uncontroverted.
40. Section 41 of the *Employment Act* sets out the procedure precepts to be complied with by the employer before terminating the services of an employee.
41. These principles or tenets were summarised by the Court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR, namely; explanation of the grounds of termination, reasons for which termination of employment is being considered, entitlement to the presence of another employee during the explanation and hearing and considering representations made.
42. Non-compliance with the prescribed procedure renders a termination of employment unfair as held by the Court of Appeal in *CMC Aviation Ltd V Mohammed Noor* (Supra) as follows;

“Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee's services but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination.”



43. The foregoing applies to the facts of the instant case on all fours.
44. Having found that termination of the Claimant's employment was unfair for want of procedural fairness, I will now turn to the reliefs available.
45. It is important to note that although RWI confirmed on cross-examination that the Claimant was paid all his dues, he did not avail evidence of payment. Relatedly, the witness conceded that the Labour Office directed the Respondent to pay some money to the Claimant which the Claimant declined. It could not have paid all his dues.

i. One month's salary in lieu of notice Kshs.10,400/=

46. The evidence on record show that the Respondent's Supervisor Mr. Depak chased the claimant away on 6th July, 2015 thus terminating his services without notice. The sum of Kshs.10,400/= is awarded as pay in lieu of notice.

ii. Unpaid leave days for 3 years

47. The Claimant led no evidence of when the leave days accrued and how many they were. The general statement made that he did not proceed on leave is insufficient to establish this prayer. It is declined.

iii. Service pay for 4.3 years

48. The Claimant led no evidence to demonstrate that NSSF contributions were not being remitted as testified by the Respondent. The prayer is declined.

iv. Public holidays

49. RWI testified that the Respondent had six (6) work days per week and employees did not work during public holidays.
Similarly, the Claimant led no evidence on the particular public holidays he was on duty.
The claim is declined.

v. Off-days

50. The Claimant led no evidence of the particulars of this prayer and the same is declined.

vi. Underpayments

51. RWI testified that in 2011, the Claimant was earning Kshs.280/= per day and by 2015, it had risen to Kshs.410/=. Whereas the Respondent was compliant in 2011, it is unclear what the payment was in 2012, 2013 and 2014 and when it rose to Kshs.410/= per day.
52. Although the Claimant led no conclusive evidence on his salary, the Respondent admitted his starting and last pay. The last daily wage payable to the Claimant was below the minimum wage which was Kshs.484.30 per day from 1st May, 2015 and 379.30 from 1st May, 2013 to 30th April, 2015.
53. Consequently, the Claimant is awarded the unpaid daily wage from 1st May, 2013 to date of termination computed on the basis of the actual days worked.



vii. Compensation for unfair termination

54. Having found that the Respondent terminated the Claimant's employment unfairly, the Claimant is entitled to the relief provided by section 49(1)(c) of the Employment Act.
55. Bearing in mind that the Claimant had had several warning letters, had served the Respondent for about 4 years 6 months, did not report back to the place of work after being chased away by the supervisor or appeal the decision, the equivalent of 3 month's salary is fair Kshs.31,200/=.
56. In conclusion, judgement is entered for the Claimant against the Respondent in the following terms:
- a. One month's salary in lieu of notice Kshs.10,400/=
 - b. Underpayments from 1st May, 2013 to 6th July, 2015 for the actual number of days worked.
 - c. Equivalent of 3 month's salary Kshs.31,200/=.
 - d. Costs of this suit.
 - e. Interest at court rates from the date hereof till payment in full.
57. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH 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 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 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

